Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

JAN RAZ,

Petitioner

v.

MARY A. BROWN

On Petition For Writ Of Certiorari
To The Supreme Court
of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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128 pp

WHETHER THE PRESUMPTIVE APPLICATION OF THE MECHANICS OF WISCONSIN'S CHILD SUPPORT STANDARD, PROMULGATED IN RESPONSE TO 45 CFR 302.56, IN THIS HIGHER INCOME, SHARED PLACEMENT FAMILY, VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO "DUE PROCESS AND EQUAL PROTECTION OF THE LAWS" AND HINDERS HIS CONSTITUTIONAL RIGHT TO THE CARE, CUSTODY AND MANAGEMENT OF HIS CHILDREN.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

CITATION OF OPINIONS AND ORDERS ENTERED 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 3

STATEMENT OF THE CASE 6

ARGUMENT 12

I. THERE IS A LACK OF CONSTITUTIONAL CONSISTENCY IN THE VARIOUS CHILD SUPPORT GUIDELINES BECAUSE WISCONSIN AND A MINORITY OF STATES HAVE ADOPTED GUIDELINES WHICH, UNDER MANY CIRCUMSTANCES, SHIFT A DISPROPORTIONATE SHARE OF RESPONSIBILITY TO SUPPORT CHILDREN UPON THE LESSER-PLACEMENT PARENT. 12

II. THE PRESUMPTIVE APPLICATION OF WISCONSIN'S CHILD SUPPORT STANDARDS IN HIGHER INCOME, SHARED PHYSICAL PLACEMENT FAMILIES, AS REQUIRED BY THE WISCONSIN SUPREME COURT IN *LUCIANI V. MONTEMURRO-LUCIANI*, 544 N.W.2D 561 (WIS. 1996), RESULTS IN A HIGHLY SKEWED PER DIEM ALLOCATION OF CHILD SUPPORT FUNDS TO THE PETITIONER ($42) AND THE RESPONDENT ($220) TO CARE FOR THE SAME CHILDREN, THEREBY VIOLATING THE

TABLE OF CONTENTS (Cont.)

PETITIONER'S 14TH AMENDMENT RIGHT TO "EQUAL PROTECTION OF THE LAWS" AND INFRINGING UPON HIS DUE PROCESS RIGHT TO MAKE DECISIONS REGARDING THE CARE, CUSTODY AND MANAGEMENT OF HIS CHILDREN. 16

A. Overview 16

B. The Disparate Treatment Of Lesser-Placement Parents Is An Arbitrary Classification Without Rational Basis. 18

C. Wisconsin's Child Support Standards Operate To Infringe Upon Lesser-Placement Parents' Fundamental Right To The Care, Custody And Management Of Their Children. 21

1. The nature of the right . . . 21

2. The child support standards deprive lesser-placement parents of discretionary funds they would otherwise have available to raise their children. . . . 23

3. The child support standards unconstitutionally obligate lesser-placement parents to finance a lifestyle contrary to their values. 26

TABLE OF AUTHORITIES

Federal Constitutional Provisions:

Fourteenth Amendment of the United States Constitution 17, 19, 27

Federal Statutory Provisions:

45 CFR 302 12

45 CFR 302.56(c)(1) 12

Federal Caselaw:

Caban v. Mohammed, 441 U.S. 380 (1979) 28

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) 17

Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983) 24

Gulf, C. & S.F.R. Co. v. Ellis, 165 U.S. 150 17

Haines v. Kerner, 404 U.S. 519 (1972) 11

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 22

Lehr v. Robertson, 463 U.S. 248 (1983) 28

May v. Anderson, 343 U.S. 528 (1953) 22

Mclaughlin v. Florida, 379 U.S. 184 (1964) 17, 18

TABLE OF AUTHORITIES (Cont.)

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 22

Plyler v. Doe, 457 U.S. 202 (1982) . 17

Prince v. Massachusetts, 321 U.S. 158 (1944) 16

Quilloin v. Walcott, 434 U.S. 246 (1978) 16, 28

Santosky v. Kramer, 455 U.S. 745 (1982) 27

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) . . . 27

Stanley v. Illinois, 405 U.S. 645 (1972) 28

Wisconsin v. Yoder, 406 U.S. 205 (1972) 21, 22

Zablocki v. Redhail, 434 U.S. 374 (1978) 21

Other Authorities:

In re Marriage of Parrett v. Parrett, 432 N.W.2d 664 (Wis. Ct. App. 1988) 26

Luciani v. Montemurro-Luciani, 544 N.W.2d 561 (Wis. 1996) . . . 9, 10

Matter of A.M.K., 312 N.W.2d 840 (Wis. Ct. App. 1981) 26

Moylan v. Moylan, 384 N.W.2d 859 (Minn. 1986) 29, 30

TABLE OF AUTHORITIES (Cont.)

Resong v. Vier, 459 N.W.2d 591 (Wis. Ct. App. 1990). 28

Wirth v. Ehly, 287 N.W.2d 140, (Wis. 1980) 11

Wisconsin Administrative Code § HSS 80 7

Wisconsin Statute 49.90(1m) 20

Wisconsin Statute 765.001 21

CITATION OF OPINIONS AND ORDERS ENTERED

Wisconsin Supreme Court Order:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., 215 Wis. 2d 421 (Wis. Sup. Ct. Table of Dispositions, 1997) (See Appendix A).

Wisconsin Court of Appeals Decision:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., Case No. 96-1997 (See Appendix B).

Trial Court Findings And Order Amending Judgment:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., Case No. 90 FA 903 638 (Milwaukee County Circuit Court, June 17, 1996) (See Appendix C).

STATEMENT OF JURISDICTION

The order from which the petitioner seeks review was entered on December 16, 1997. There have been no rehearings or extensions of time to file this petition.

The petitioner believes this Court's jurisdiction to review on a writ of certiorari the order in question is conferred by 28 U.S.C. §1257(a).

This Court should also note that this Petition draws into question the constitutionality of Wisconsin regulations and accordingly, 28 U.S.C. §2403(b) may apply. Therefore, three copies of this Petition will be served upon the Attorney General for the State of Wisconsin.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article XIV, Section 1 of the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45 CFR 302.56(c)(1) (See Appendix D)

Wisconsin Administrative Code § HSS 80 (See Appendix E)

Wisconsin Statute §49.90(1m):

Each spouse has an equal obligation to support the other spouse as provided in this chapter. Each parent has an equal obligation to support his or her minor children as provided in this chapter and chs. 48 and 938. Each parent of a dependent person under the age of 18 has an equal obligation to support the child of the dependent person as provided under sub. (1)(a)2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE (Cont.)

Wisconsin Statute §765.001:

Title, intent and construction of chs. 765 to 768. (1) TITLE. Chapters 765 to 768 may be cited as "The Family Code."

(2) INTENT. It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children

and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

(3) CONSTRUCTION. Chapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2).

STATEMENT OF THE CASE

The marriage of Jan and Mary Raz lasted from December of 1979 to December of 1991, during the course of which they had two children, Kelly (born January 15, 1984), and Cathleen (born September 25, 1986). Kelly and Cathleen were ages seven and five, respectively, when the divorce judgment was entered. They are presently ages fourteen and eleven.

The court approved the divorce stipulation granting the parties joint custody of the children and Mary primary placement, with Jan getting significant periods of secondary placement. As for financial obligations, Jan agreed, based on the parties' respective incomes, to pay $2,100.00 per month in child support.[1] At the time of the divorce, Jan was earning $9,688 per month while Mary was earning $2,674 per month. Jan was not required to pay maintenance.

On April 12, 1995, Jan filed a motion seeking primary placement of the children on the grounds Mary was attempting to alienate the children from him. Concurrently, Jan also filed an independent motion seeking modification of the child support order under the then-existing placement arrangement, asserting there had been a substantial change of economic circumstances. In accordance with

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[1] Although Wisconsin had child support percentage standards promulgated by the Department of Health and Social Services at the time of the divorce, they were not used in determining the proper level of child support, as referenced on page 4, item 13 of the court order.

local rules, the child support motion was scheduled before a family court commissioner while the motion addressing placement was referred to the circuit court judge assigned to the case.

On May 16, 1995, a family court commissioner conducted a hearing on the child support motion, found there had been a substantial change of circumstances, and ordered Jan's child support payment reduced to $1,500.00 per month, effective May 1, 1995. The commissioner arrived at this amount through application of the "new" HSS 80 Child Support standard. (See Appendix E). The commissioner's order authorized either party to seek a judicial review of the child support order "without filing review papers." On October 24, 1995, Jan requested judicial review of the commissioner's child support order, availing himself of the statutory procedure which allows a party to have the matter heard *de novo*. On December 19, 1995, Mary filed a countermotion to increase the commissioner's child support order.

By the time the trial court conducted the *de novo* hearing on April 23 and 24, 1996, Jan had elected to proceed *pro se*. At the hearing, the parties stipulated to maintain the existing placement schedule with only minor changes. The court found Jan's physical placement responsibilities for the two children constituted 36% of their total placement. This left only the child support order to be resolved.

The trial court took testimony by both parties, as well as an expert witness, as to the parties' financial situations. The trial court found Jan's monthly income to be $9,032.00 and Mary's

monthly income to be $9,543.00. The trial court further found reasonable Jan's monthly budget expenses of $3,840.00 as well as Mary's monthly budget expenses of $4,920.00. Finally, the trial court did not dispute that Mary's monthly expenses on behalf of the children were $1,800.00 while Jan's monthly expenses for the children were $900.00.

Jan, however, noted that were the child support standards mechanically applied in this manner, the $1,800[2] he would be obligated to pay Mary each month coupled with the $900 he was paying monthly to directly support the children would impose on him a total monthly financial obligation for the children of $2,700, or 30% of his $9,032 monthly gross income. Jan observed that by contrast, application of the standards would impose on Mary a total obligation for the children of $0 per month, or 0% of her $9,543 monthly gross income.

Noting this allocated $220 per day to Mary but just $42 per day to him to care for the same children, Jan requested the court find this disparity unfair, deviate from the application of this standard and define a child support award which would, as Wisconsin law requires, impose roughly equal financial obligations upon the parties to support their children. Jan

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[2] The base child support obligation under the percentage standards for two children is 25% of gross income. However, a parent who has 36% of placement such as Jan is deemed a shared time payer and is entitled to a percentage reduction which reduces the base obligation by approximately 20%.

suggested the stated intent of the standard could be roughly achieved by entering a monthly child support order in the amount of $600, which would make his total monthly obligation $1,500 while Mary's would be $1,200. This, he observed, would allow him $151 per day and Mary $157 per day to care for the children.

The trial court, however, rejected Jan's request and strictly applied Wisconsin's child support standards, (See Appendix E), and ordered Jan to pay monthly support to Mary in the amount of $1,806.00. In so doing, the trial court appeared to misapprehend Jan's position by myopically and cynically assuming Jan's complaint was that strict adherence to the guidelines unfairly allowed Mary a disproportionate advantage in discretionary income. In fact, the focus of Jan's position was not individual economics, but instead, parental obligations and more specifically, that strict application of the guidelines defeated legislative and departmental intent to distribute the child support burden equally between the parents.

The trial court, however, focused on the fact that after payment of support, Jan would have net disposable income of $4,250.00 per month while Mary would have $8,253.00. Thereafter, the court, citing *Luciani v. Montemurro-Luciani*, 544 N.W.2d 561 (Wis. 1996), (See Appendix F), concluded it could not deviate from the guidelines since:

> [T]he Supreme Court said the numbers alone aren't enough, and what's been presented here are numbers.

The court reasoned that since Jan had not demonstrated a hardship to himself or the children, there was nothing unfair in applying the guidelines. Then, adding insult to injury, the court even awarded Mary one of the tax exemptions for the children.

On June 7, 1996, the trial court entered an order entitled "Findings and Order Amending Judgment" reflecting the above-referenced disposition. On July 10, 1996, Jan, still proceeding *pro se*, filed a Notice of Appeal from the June 7, 1996, order raising, *inter alia*, the following issue:

> Did the trial court err by not finding that the application of the child support standard in this case was **UNFAIR** to the father and the children and not modifying the amount of child support payments determined by the robotistic application of the mechanics of the HSS 80 child support standard?

(Emphasis added). In his *pro se* brief, Jan argued that application of the standards had deprived him of equal protection of the law as required by the United States Constitution.

On September 16, 1997, the Wisconsin Court of Appeals, District I, affirmed the lower court's order in its entirety. (See Appendix B). Construing Jan's argument to be little more than an attempt to distinguish his case from *Luciani*, and focusing on the more pedestrian of Jan's arguments (e.g., income disparity causes parental strife thereby harming children), the court of appeals affirmed the lower

court's order and recommended its decision for publication.[3]

In so doing, the court of appeals refused to address Jan's equal protection argument. The appellate court reasoned Jan had not adequately raised the claim before the trial court, despite a body of caselaw allowing appellate courts to consider constitutional issues raised for the first time on appeal if justice so requires and the parties have an adequate opportunity to brief the issues. *See e.g., Wirth v. Ehly*, 287 N.W.2d 140, 145-46 (Wis. 1980), and despite Jan's cite to *Haines v. Kerner*, 404 U.S. 519 (1972) for the proposition that the pleadings of a *pro se* litigant should be liberally construed.

On October 10, 1997, Jan petitioned the Wisconsin Supreme Court to review the decision of the court of appeals. On December 16, 1997, the Wisconsin Supreme Court denied Jan's petition. (See Appendix A).

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[3] The court of appeals decision has now been published in Wisconsin. *In re the Marriage of Jan Raz v. Mary Brown, D.D.S.*, 570 N.W.2d 605 (Wis. Ct. App. 1997).

ARGUMENT

I. THERE IS A LACK OF CONSTITUTIONAL CONSISTENCY IN THE VARIOUS CHILD SUPPORT GUIDELINES BECAUSE WISCONSIN AND A MINORITY OF STATES HAVE ADOPTED GUIDELINES WHICH, UNDER MANY CIRCUMSTANCES, SHIFT A DISPROPORTIONATE SHARE OF RESPONSIBILITY TO SUPPORT CHILDREN UPON THE LESSER-PLACEMENT PARENT.

Under 45 CFR 302, et. seq., a state wishing to receive federal funding must, among other things, establish presumptive child support guidelines for the use of its courts. One aspect of that federal law particularly germane to this petition is that the state guidelines must be based on the income of the "absent parent." 45 CFR 302.56(c)(1). (See Appendix D). Federal law does not require, however, that the guidelines factor in the income of the other parent or distinguish between an absent parent and a parent who shares in the placement responsibilities for the child.

A majority of states responded to this federal directive by establishing guidelines consistent with the recommendations of a 1987 report entitled "Development of Guidelines for Child Support Orders." The authors of that report discovered that while parents do spend more money on their children as the family's income *increases*, the overall percentage of total family gross and net income spent on children actually *decreases*. Therefore, to effectuate the policy that children should receive support at the level they would have received had the marriage remained intact, and to ensure each parent contributes an

equal portion of their income to support their children, the panel recommended child support guidelines be structured to consider the income of both parents.

Wisconsin, however, along with four other states, eschewed this recommendation and adopted guidelines which consider only the income of the lesser-placement parent, unless a significant percentage placement threshold is crossed. Consequently, lesser-placement parents in Wisconsin must contribute a set percentage of their gross income, regardless of the combined family income or the economic needs of the children.[4] While the difference between the two different state models may be insignificant for families with average and below average family incomes, in families where there is above average income, the guidelines compel the lesser-placement parent to pay a substantially larger percentage of his or her income to support their children than the greater-placement parent.

The lack of uniformity among the states' presumptive child support guidelines, however, does not stem merely from differences in how, or whether, the income of the greater-placement parent is treated. There are also differences in what recognition is given funds expended by the lesser-placement parent to directly support his or her children. In response to the recent trend of both parents sharing in the responsibilities of raising their children, and therefore, both

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[4] A third category of eight states use this same approach but considers the noncustodial parent's net, instead of gross, income.

spending resources to directly support their children, some states account for these expenses in their child support guidelines.

Other states like Wisconsin, however, have not yet established a presumptive method to account for the shifting of expenses from the greater-placement to the lesser-placement parent, or do so improperly. In those states, to varying degrees, it has been legislated, *de facto*, that lesser-placement parents are allotted a smaller *per diem* allocation of the funds available to support the same child.

This lack of uniformity among the states not only raises questions of fundamental fairness, but presents problems relative to enforcement. In light of the growing interstate enforcement of child support awards, the disparity in approaches raises a variety of problems. The crux of the problem is well illustrated by this case - where the petitioner's presumptive child support order of $1,806 monthly would have been a mere $320 had his family traded the green pastures of Wisconsin for the blue ridges of Virginia.

The mechanics of Virginia's child support guidelines result in both parents contributing equal portions of their income to support their children. Just as important, they allocate each parent an equal per diem level of child support funds to care for their children. Wisconsin's standards, as demonstrated by this case, achieves neither of these results.

The lack of uniformity among the states will continue to foster needless

litigation, complicate the collection of unpaid support and undermine public confidence in the fairness of government until this Court intercedes and requires that child support guidelines offer equal protection to all parties. Until that occurs, one can surmise there will be a great deal of resources expended to litigate (and in some cases create) jurisdictional issues. One might also imagine the reluctance of a state like Virginia to extradite a resident to Wisconsin to face incarceration or other penalties for failure to pay support when the resident is paying even more in child support than Virginia would require.

A decision by this Court establishing that the obligation to support one's children must be the product of both parents' incomes, borne equally by both parents, and that children are entitled to an equal per diem support amount in both homes would establish a national fundamental standard of fairness for states to follow when customizing their own guidelines by choosing how they will effectuate that requirement.

II. THE PRESUMPTIVE APPLICATION OF WISCONSIN'S CHILD SUPPORT STANDARDS IN HIGHER INCOME, SHARED PHYSICAL PLACEMENT FAMILIES, AS REQUIRED BY THE WISCONSIN SUPREME COURT IN LUCIANI V. MONTEMURRO-LUCIANI, 544 N.W.2D 561 (WIS. 1996), RESULTS IN A HIGHLY SKEWED PER DIEM ALLOCATION OF CHILD SUPPORT FUNDS TO THE PETITIONER ($42) AND THE RESPONDENT ($220) TO CARE FOR THE SAME CHILDREN, THEREBY VIOLATING THE PETITIONER'S 14TH AMENDMENT RIGHT TO "EQUAL PROTECTION OF THE LAWS" AND INFRINGING UPON HIS DUE PROCESS RIGHT TO MAKE DECISIONS REGARDING THE CARE, CUSTODY AND MANAGEMENT OF HIS CHILDREN.

A. Overview

The parent-child relationship has long been acknowledged to have a constitutional dimension. The United States Supreme Court in *Quilloin v. Walcott*, 434 U.S. 246 (1978), wrote:

> We have recognized on numerous occasions that the relationship between parents and child is constitutionally protected.
>
> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. at 255, *citing Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). It is now firmly established that freedom of personal choice in matters of family life is one of the liberties protected by

the due process clause of the Fourteenth Amendment. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-640 (1974).

The Equal Protection Clause of the Fourteenth Amendment preserves a role of equality, and standing by itself prohibits legislation which restricts the rights and freedoms of one individual class but not of another similarly situated. While this general rule has been subject to limitation by the legislature and the courts, the Equal Protection Clause contained in the Federal Constitution continues to command that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a directive that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

In *Mclaughlin v. Florida*, 379 U.S. 184 (1964), the Supreme Court established the present Fourteenth Amendment Equal Protection standard. According to the Court:

> [C]lassification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.' . . . '[A]rbitrary selection can never be justified by calling it a classification.'

Mclaughlin, 379 U.S. at 189, *quoting Gulf, C. & S.F.R. Co. v. Ellis*, 165 U.S. 150, 155 (1897). Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal

application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. *See Mclaughlin*, 379 U.S. at 190.

Child support schemes such as Wisconsin's establish numerous classifications worthy of examination. Most poignant to this petition, however, is the different treatment accorded lesser-placement versus greater-placement parents. It is this classification, and the effect it has on a parent's fundamental right to care for his or her children, that will be examined in this petition.[5]

B. The Disparate Treatment Of Lesser-Placement Parents Is An Arbitrary Classification Without Rational Basis.

In shared placement families, when two custodial parents of the same children are both assuming a placement role in raising the children, they are like persons in like circumstances. Indeed, beyond the obvious difference in gender and perhaps a somewhat different percentage of placement, each parent is very similarly situated. Each must provide

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[5] Though not examined in this petition, it should also be noted that while the child support scheme may be facially gender neutral, in shared placement and/or higher income families it has an overwhelmingly disparate impact upon men versus women, since the vast majority of lesser-placement or noncustodial parents are men.

an environment which will accommodate their children's needs and directly support the children during their respective periods of placement. An even more germane similarity is that each will need a similar per diem amount of funds for this purpose.

As this case illustrates, however, despite the fact that from the standpoint of parenting, these two people have far more similarities than differences, Wisconsin's child support standards ordain vastly different treatment. (See Appendix E). Indeed, given that Wisconsin's express intent, when applied to the Raz family, is that the Raz children enjoy a post-divorce standard of living based on an average expenditure of $155 per day, the court order allocating $42 per day to the parent caring for the children 11 days per month and $220 per day to the parent caring for the children 19 days per month, manifests the magnitude of the disparate treatment.

Wisconsin's child support standards run afoul of the Fourteenth Amendment Equal Protection standard because, among other things, they arbitrarily require lesser-placement parents in higher income families to provide a greater-percentage of their income to support their children. This, in turn, allows greater-placement parents to escape what is supposed to be an equal obligation to support their children.

Nowhere is the inequity of this scheme illustrated more starkly than in the present case where Jan is called upon to ante up 30% of his gross income while Mary is relieved of sharing any of her significant income to support the same children. Like so many lesser-placement

parents, Jan is expected to and does provide the same services as Mary to care for his children, but is allowed only a sliver of the child support pie to assist him in doing so.

There is no rational basis for treating lesser-placement parents, and more importantly, children, in this fashion. No state objective is achieved. On the contrary, the state's primary objective - securing the best interests of the children - is actually undermined significantly by a protocol that fosters placement litigation. Under Wisconsin's guidelines, winning primary placement in higher income, shared placement families not only emotionally enriches one's relationship with one's children, it also economically enriches one's relationship with one's pocketbook. This is so because an award of primary placement shifts a disproportionate amount of financial responsibility for supporting the children onto the lesser-placement parent.

Such child support guidelines do not merely erode the touchstone for divorce litigation, they further undermine the state's express goal of imposing an equal support obligation on both parents:

> Each parent has **an equal obligation** to support his or her minor children as provided in this chapter and . . .
>
> Wis. Stat. 49.90(1m)(emphasis added).
>
> (2) Each spouse has **an equal obligation** in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor

children and of the other spouse. **No spouse may be presumed primarily liable for support expenses** . . .

(3) Chapters 765 and 768 **shall** be liberally construed to effect the objectives of sub(2).

Wis. Stat. 765.001 (emphasis added). Thus, Wisconsin's child support standards do not merely passively fail to further any reasonable state objective, in fact, they actively undermine express state objectives to make parents equally responsible for supporting their children.

The disparate treatment that lesser-placement parents receive by virtue of this arbitrary classification does not, however, merely infringe upon their right to equal treatment. Indeed, as discussed in the following section, the child support standards work a much more insidious infringement - they interfere with a parent's fundamental right to the care, custody and management of his or her children.

C. Wisconsin's Child Support Standards Operate To Infringe Upon Lesser-Placement Parents' Fundamental Right To The Care, Custody And Management Of Their Children.

1. The nature of the right

Although not explicitly mentioned in the United States Constitution, a parent's right to participate in the rearing of children is clearly a fundamental right which is constitutionally protected. *Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972); *Zablocki v. Redhail*, 434 U.S. 374,

384-385 (1978). The Supreme Court long ago emphatically declared that a parent's right to "**the companionship, care, custody and management of his or her children**" is an interest "far more precious" than any property right, *May v. Anderson*, 343 U.S. 528, 533 (1953) (emphasis added), and:

> an important interest that understandably warrants deference and, absent a powerful countervailing interest, protection.

Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

The constitutionally protected liberty in family relationships and child rearing is not a recent innovation. Indeed:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Yoder, 406 U.S. 205 at 232. A child is not a mere creature of the state.

> Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

2. The child support standards deprive lesser-placement parents of discretionary funds they would otherwise have available to raise their children.

Wisconsin's child support standards, (See Appendix E), violate lesser-placement parents' rights to raise their children in this fashion because they ignore the economic reality of non-intact families. In such families, both parents, to provide their children a similar living, incur similar fixed expenses for housing, transportation and daily expenses of food and entertainment. While the amount each parent needs monthly may be different, based upon greater or lesser placement, the amount each parent needs on a daily basis is roughly equivalent.

The application of Wisconsin's child support standards, however, frustrates this balance by shifting such a disproportionate amount of the total child support funds to the greater-placement parent that the lesser-placement parent is left an inadequate per diem amount to pay for the children's basic needs, much less expend discretionary amounts on the children. In so doing, the standards infringe upon the lesser-placement parent's fundamental right to "the custody care and nurture of the child" and "freedom of person choice in matters of family life" by depriving this parent of funds needed to provide the standard of living to which the State has established the children are entitled.

The present case, where the total child support funds available are allocated such that the greater-placement

parent enjoys a $220 per diem level of support while the lesser-placement parent is allowed a $42 per diem level of support, illustrates the gravity of the problem. The dramatic shifting of child support funds from the lesser-placement parent to the greater-placement parent will logically have a detrimental impact upon the lesser-placement parent's ability to raise his children.

The impact, however, is not felt solely by the parent although it is his constitutional rights which come most clearly in focus. When a lesser-placement parent is paying a disproportionate amount of income for support, such that he or she can no longer afford a meaningful relationship with the children, the children's right to a relationship with the lesser-placement parent is also needlessly endangered, and the rights of both parent and child are impinged:

> A parent's right to the preservation of this relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult.

Franz v. United States, 707 F.2d 582, 595-599 (D.C. Cir. 1983).

There is no rational basis, much less a compelling State interest, in establishing for children two households, each with a widely disparate standard of living. Once a child's basic needs are met, the quality of the child's standard of living with a particular parent should not be legislatively mandated but instead, should be an expression of that parent's values.

While there is a legitimate state interest in requiring parents to provide their children with basic necessities, government is not allowed, in the absence of compelling state interest, to subordinate the fundamental rights of parents by establishing, via legislative fiat, a distinct economic sphere in each household. Any perceived dichotomy created by Wisconsin's support laws between intact, as opposed to non-intact families, with regard to parental prerogatives in discretionary spending on children, is not a constitutionally permissible exercise of governmental power since it impinges upon the fundamental right to establish a home and to raise children without governmental interference in the absence of a compelling state interest:

> **[T]here is a fundamental right to establish a home and to raise children without governmental interference.** This right has been recognized in a wide variety of contexts by the United States Supreme Court, the federal courts and the Wisconsin Supreme Court. While that right is not absolute, we are persuaded that it is a basic right with which the state may not interfere absent a

> **compelling reason for doing so** and that the interest in "maintaining the integrity of [a] family unit" is sufficient to rise to the level of a fundamental right which may not be invaded by the state on a mere rational basis test.

Matter of A.M.K., 312 N.W.2d 840, 847 (Wis. Ct. App. 1981) (emphasis added).

This proposition is acutely true in this particular case. First, the amount taken bears no relationship to the actual needs of the child. Second, the percentage standards only take from a lesser-placement parent, and contain no requirements that any of the property taken will, in fact, go to the child. While the law has a well-founded goal, it does not accomplish its purpose.

For this reason, the percentage standards do not comply with due process requirements under even the less stringent rational basis test. *See also In re Marriage of Parrett v. Parrett*, 432 N.W.2d 664 (Ct. App. 1988) (rejecting mechanical application of child support guidelines and allowing deviation to avoid "irrational" relationship between support and children's "needs").

3. The child support standards unconstitutionally obligate lesser-placement parents to finance a lifestyle contrary to their values.

It is not, however, merely the resultant diminishment of funds which affects lesser-placement parents' fundamental right to raise their children

as they see fit. Indeed, this right is further eviscerated because the income of lesser-placement parents is conscripted to underwrite a lifestyle which may be completely at odds with their values.

The fundamental right to the management and companionship of one's children does not evaporate simply because of a divorce. Freedom of personal choice in family life is a liberty interest protected by the Fourteenth Amendment:

> A parent has a constitutionally protected liberty interest in the companionship and society of his or her child. . . . [which] logically extends to protect children from unwarranted state interference with their relationships with their parents.

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987);

Although the state has an interest in the basic welfare of children, that interest is not superior to that of either parent. Expenditure of child support money is within the legitimate interest of **both** custodial parents insofar as it relates to the care and management of their children:

> The custodial parent should not lightly be stripped of her ability to make decisions concerning rearing her child. Eliminating a custodial parent's right to make spending decisions is more akin to altering the parent's custodial powers than it is to a modification of the amount of child support.

Resong v. Vier, 459 N.W.2d 591, 596 (Wis. Ct. App. 1990).

The father is the payor spouse in a majority of divorce cases. Unless his parental rights have been terminated, the father retains a recognized constitutional equal right to participate in the development of his children. There is no distinction between a father's and a mother's rights and responsibilities vis-a-vis their children. *See, Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Based on the foregoing reasons and authorities, it is unconstitutional to deprive a parent of the fundamental right to promote his own parental values by redistributing the discretionary use of his income in such a way that requires him to finance the inculcation of values contrary to his own. The respondent may wish to shower the children with the trappings of a material society. That is, after all, her parental prerogative and she possesses an equally protected right to raise, educate and manage her children as she sees fit when they are in her home.

The petitioner, however, as a joint custodian, cannot be forced by the government to bankroll her attempts to raise the children (assuming she spends the money on the children) in a manner which is diametrically contrary to his parenting philosophy without violating his constitutional rights. Such an award could severely undermine the petitioner of his ability to teach his children the value of a frugal lifestyle, hard work and its rewards, and his philosophy that the

spiritual aspects of life transcend the material ones.

Despite the fact there may be a consensus that "the more money spent on children, the better," this has never been the touchstone of Constitutional analysis. While some may argue luxuries such as designer tennis shoes, professional sports apparel, remote control cars, Nintendo™, etc., may be beneficial to children, the ultimate decision whether to provide such amenities is a value judgment. Amish and Mennonite societies serve to remind us "the more the better" is not a universally embraced ideal.

Justice Yeltis, concurring in the Minnesota Supreme Court case *Moylan v. Moylan*, 384 N.W.2d 859 (Minn. 1986), recognized the importance of this province reserved to parents when he reasoned the legislature could not pass a statute requiring married parents to provide a minimum dollar for their children beyond adequate food, clothing and medical care:

> This is because some families, even with great financial resources, might want to raise their children in a spartan atmosphere in order to impress upon their children the value of money and the sacrifice and effort required to raise it. Other parents might be extremely generous, granting their children material privileges few other children will ever see or experience in their lifetimes. Such is life. Our courts, in interpreting our constitution and our laws, do not mandate equality in lifestyles; they

> only mandate that all citizens have equal opportunity before the law.

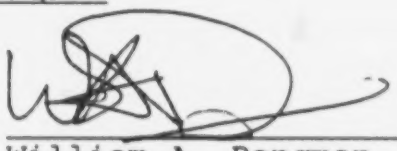
Moylan at 866.

Where a family has remained intact, there is no debate engendered over the constitutional permissibility of government seeking to inject itself into this value-laden sphere of influence reserved to parents. The specter of the government invading the sanctuary of an intact home and ordering parents to forsake other responsibilities of life and their role as parents to earn ever increasing amounts of money to feed this materialism is so repulsive that no one would dare question the unconstitutionality of such a usurpation. It is no less repulsive, no less unconstitutional, simply because the family has been broken. Divorce does not diminish the full voltage of the parental rights at stake.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that the United States Supreme Court grant his petition.

Dated: March 12, 1998



William A. Pangman
Attorney for Petitioner

TABLE OF CONTENTS

Wisconsin Supreme Court Order . . App. A

Wisconsin Court of Appeals Decision . . . . . App. B

Trial Court Findings and Order Amending Judgment . . . . App. C

45 CFR 302.56 . . . . . App. D

Wisconsin Administrative Code §HSS 80 . . . . . App. E

Luciani v. Montemurro-Luciani 544 N.W.2d 560 (Wis. 1996) . . App. F

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SUPREME COURT
[SEAL]
OF WISCONSIN

TO: December 16, 1997

Hon. Gary A. Gerlach
Milwaukee County Circuit Court
901 N. 9th Street
Milwaukee, WI 53233

Jan Raz
10120 West Forest Home Avenue
Hales Corners, WI 53130

Randolph E. House
5150 N. Pt. Washington Rd., #210
Milwaukee, WI 53217

You are hereby notified that the Court has entered the following order:

No. 96-1997 Marriage of: Raz v. Brown
L.C.#90FA9033638

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioner-appellant-petitioner, Jan Raz, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1998
Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-1997

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:

JAN RAZ,

PETITIONER-APPELLANT,

v.

MARY BROWN, D.D.S.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: GARY A. GERLACK, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Jan Raz appeals from a post-judgment order modifying his child support obligation to $1800 per month. Raz claims the trial court erroneously exercised its discretion in calculating his child support obligation by applying the child support percentage standards. Further, he claims the trial court erred in calculating his monthly income. Under current statutory and case law, the trial court was obligated to determine child support by applying the child support percentage standards unless Raz could demonstrate that their use was unfair to the children or himself. The trial court appropriately exercised its discretion in determining that Raz had not met his burden of proof. The trial court also properly exercised its discretion in adopting the expert witness's testimony as to Raz's actual income. We affirm.

I. BACKGROUND.

Raz and Mary A. Brown were married in 1979 and divorced on December 12, 1991. At the time of the divorce, Raz and Brown entered into a marital settlement agreement which gave them joint custody of their two children with Brown having primary placement of the children. The stipulation also required Raz to pay $2100 per month in child support. At the time of the divorce, Raz's monthly income was $9688 and Brown's was $2674. Both Raz and Brown had other income from investments.In April 1995, Raz brought motions seeking, *inter alia*, to modify his child support obligation due to a claimed substantial change of circumstances. After a contested hearing in front of the court commissioner, Raz was ordered to pay $1500 a month in child support. Both Raz and Brown appealed this order to the circuit court. After a contested hearing, the trial

court found Brown's yearly income was $114,516, and adopted Brown's expert witness's opinion that Raz's actual yearly income was $108,384. The trial court, using the WIS. ADM. CODE § HSS 80 child support standard and the shared time payer formula, then ordered Raz to pay child support of $1800 per month.[1] Raz now appeals.

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[1] WIS. ADM. CODE § HSS 80.04(2), provides:

> **(2)** DETERMINING THE CHILD SUPPORT OBLIGATION OF A SHARED-TIME PAYER. The child support obligation in cases where both parents provide overnight child care beyond the threshold may be determined as follows:
>
> (a) Determine the number of overnights, or the equivalent as determined by the court in accordance with s. HSS 80.02 (25), each parent has the child per year. If the parent with less time has the child at least 110 overnights but not more than 146 overnights, follow the procedure in par. (b). If each parent has the child for at least 147 overnights but for not more than 218 overnights, follow the procedure in par. (c).
>
> (b) In cases where the parent with less time has the child for at least 110 overnights, or the equivalent as determined by the court in accordance with s. HSS 80.02 (25), per year but not more than 146 per year, determine the child support as follows:
>
> 1. Determine the child support

II. ANALYSIS.

A. Standard of Review.

The determination of appropriate child support is committed to the sound discretion of the trial court. **Weidner v. W.G.N.**, 131 Wis.2d 301, 315, 388 N.W.2d 615, 622 (1986); **Prosser v. Cook**, 185 Wis.2d 745, 751, 519 N.W.2d 649, 651 (Ct. App. 1994). Whether the trial court properly exercised its discretion is a question of law. **Seep v. State Personnel Comm'n**, 140 Wis.2d 32, 38, 409 N.W.2d 142, 144 (Ct. App. 1987). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." **State v. Gudenschwager**, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995). A trial court, in setting child support, is statutorily obligated to use the percentage standards set by the Department of Health

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obligation under s. HSS 80.03 (1) of the parent with less time;

> 2. Divide by 365 the number of overnights the parent with less time has physical placement of the child to determine the percentage of the year that the parent with less time provides overnight care;
>
> 3. If the percentage under subd. 2 is over 30% but not more than 40%, reduce the child support obligation under subd. 1 in accordance with Table 80.04 (2) (b).

and Social Services.[2] *See* § 767.25(1j), STATS. ("Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9).") This legislative directive has been affirmed several times by the appellate courts. *See* **Grohmann v. Grohmann**, 189 Wis.2d 532, 536, 525 N.W.2d 261, 262 (1995), and **Kjelstrup v. Kjelstrup**, 181 Wis.2d 973, 975, 512 N.W.2d 264, 265 (Ct. App. 1994). The percentage standards which the Department of Health and Social Services established are set out in Chapter HSS 80 of the Wisconsin Administrative Code. The percentage standards currently require child support for two children to be set at twenty-five percent of the payer's base or adjusted base.[3] A trial court may only depart from the percentage standards "if, after considering the factors listed in s. 767.25 (1m) . . . the court finds, by the greater

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[2] The Department of health and Social Services was renamed the Department of Health and Family Services, effective July 1, 1996, pursuant to 1995 Wis. Act 27, §§9126 (1() and 9426 (16).

[3] WIS. ADM. CODE § Hss 80.03(1)(b), provides:

(1) DETERMINING CHILD SUPPORT USING THE PERCENTAGE STANDARD. The payer' s base shall be determined by adding together the payer' s gross income available for child support under sub. (2), if appropriate, and the payer's imputed income for child support and dividing by 12. . . . The percentage of the payer's base or adjusted base that constitutes the child support obligation shall be:

(b) 25% for 2 children.

weight of the credible evidence, that the use of the percentage standard is unfair to the child or to any of the parties." **Kjelstrup**, 181 Wis.2d at 975, 512 N.W.2d at 265; *see also* § 767.25(1m), STATS. The factors courts may consider when contemplating a deviation from the percentage standard are found at § 767.25(1m), STATS. [4] Our supreme court

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[4] Section 767.25(1m), STATS., provides:

(1m) Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:

(a) The financial resources of the child.

(b) The financial resources of both parents as determined under s. 767.255.

(bj) Maintenance received by either party.

(bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 USC 9902(2).

(bz) The needs of any person, other than the child, whom either party is legally obligated to support.

(c) The standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.

recently reaffirmed the presumptive use of the child support percentage standards in high-income cases. *See* **Luciani v. Montemurro-Luciani**, 199 Wis.2d 280, 544 N.W.2d 561 (1996). In **Luciani**, the payer's income was substantially less than the

---

(d) The desirability that the custodian remain in the home as a full-time parent.

(e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.

(ej) The award of substantial periods of physical placement to both parents.

(em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.24.

(f) The physical mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).

(g) The child's educational needs.

(h) The tax consequences to each party.

(hm) The best interests of the child.

(hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.

(i) Any other factors which the court in each case determines are relevant.

payee's income, but the court concluded that that fact alone was insufficient to show unfairness under § 767.25(1m), STATS. The court explained:

> The obligation to support one's children is a basic one. Luciani's contention that he should be relieved of this burden simply because his ex-wife earns a substantially higher income runs contrary to the paramount goal of child support, namely, securing the best interests of the children. We recognize the role that income disparity may play in a particular case, but under the facts before us, it is only relevant where Luciani can demonstrate that he is unable to pay the court ordered child support or that such disparity in income will adversely affect the children or himself.

Id. at 309, 544 N.W.2d at 572 (citation omitted). The court also restated that the party requesting the modification under the percentage standards bears the burden of proof before the trial court. Id. at 295-96, 544 N.W.2d at 567.

B. Analysis.

The trial court found that Raz failed to meet his burden to show that it would be unfair to apply the percentage standards in his case. Raz claims that the trial court's finding was an erroneous exercise of discretion. Raz does not claim that the trial court failed to examine the relevant facts, and most of the time, he does not seem to claim the trial court applied an improper standard of law. Rather, Raz appears to claim that the trial court, after applying the facts to the law, reached a

conclusion that no reasonable judge could make. We disagree.

The trial court's oral decision contains a thoughtful and thorough recitation of the facts and the law. The court found that, after paying child support, Raz had $4250 of disposable income, while Brown had $8253. The trial court realized that this was a significant discrepancy, but addressed the issue, stating:

> Dr. Brown's budget, her income is substantially more than Mr. Raz's income. The spread between what he needs and what he's actually ending up with after taxes and paying child support - and Mr. Raz makes some very valid arguments about how the numbers aren't fair . . . [B]ut the Supreme Court said the numbers alone aren't enough, and what's been presented here are numbers. I have nothing in the record that shows that it is unfair to the children in any way by applying the standards.

The court then noted that there was no evidence to show the children were harmed because Brown had more disposable income than Raz. The court also found that Raz failed to show he would be unable to live at the same standard of living he was used to. After going through all of the factors listed at § 767.25(1m), STATS., the court concluded that Raz "had not met his burden of proof in establishing that use of the standards would be unfair to him or his children." We agree.

Raz has failed to meet the difficult burden of showing that no reasonable judge could have reached the same conclusion as the trial court. The **Luciani** case is

instructive. While Raz must pay twenty percent of his income in child support, the payer in **Luciani** was required to pay twenty-four percent of his income. This was true even though, as in Raz's case, the payer in **Luciani** was required to spend far more of his disposable income on child support than the payee. Also, the percentage standards were not found to be "unfair" in **Luciani**, even though the payer's income plus maintenance was one-third of the payee's income.

To escape **Luciani**'s holding, Raz needed to do more than point out the disparity in disposable incomes which the child support percentage standards produced. According to **Luciani**, income disparity is only relevant if payers can show they are unable to pay the court-ordered child support or that the income disparity will adversely affect the children or themselves. **Luciani**, 199 Wis.2d at 309, 544 N.W.2d at 572. Raz attempts to make this showing with several arguments. First, Raz claims that the income disparity contributes to strife between himself and Brown, thereby harming the children and himself. Second, Raz claims that, because he has less discretionary income than Brown to spend on the children, the children are harmed by living at a lower standard of living when in his care.

The stated intent of the child support percentage standard provisions is to insure that children are not adversely affected by divorce. Equalizing lifestyles between divorced parents is not one of the objectives of the provisions. The amount of discretionary income which either parent may have available to spend on their children is also a secondary consideration. What is paramount is that both parents pay a fair amount for their children's essential care.

We note that following divorce, many children find themselves living in homes where their parents have different standards of living. Some differences in standards of living are self-imposed, while others are economically imposed. Reducing a child support payment in order to equalize standards of living between parents is no guarantee that strife will subside, nor is a reduction often in the children's best interests. Therefore, the trial court properly exercised its discretion when it found that "[t]here is no evidence in this record which indicates any harm to the children because Mother has more disposable income."

We further note that much of Raz's argument attacks the actual percentage standards, rather than the court's application of those standards to the facts of this case. Indeed, Raz requests at one point that this court "correct the flaws of the present rule so as to spare other families the damage which this family has experienced." This argument is better addressed to the legislature.

Raz additionally argues that the application of the percentage standards violates his right to equal protection of the laws under the United States and Wisconsin Constitutions. Raz also includes two new arguments in his reply brief. The equal protection and the reply brief arguments were never raised in the trial court. Therefore, we decline to address these arguments. *See* **Wirth v. Ehly**, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980) ("[I]ssues not raised or considered in the trial court will not be considered for the first time on appeal.").

Finally, Raz argues that the trial court incorrectly determined his income by accepting the testimony of Brown's expert witness.[5] Essentially, Raz argues that a repayment of a loan is not income. He offers no support for this assertion. Brown argues that weighing the credibility of a witness is a function for the trier of fact, and that the trial court properly accepted her expert witness's testimony. We agree. **Lellman v. Mott**, 204 Wis.2d 166, 173, 554 N.W.2d 525, 528 (Ct. App. 1996), instructs: "[T]he test to be applied by the appellate court must, of necessity, involve a determination whether the trial court's finding of fact could reasonably be made based upon the available information." (citing **Hartung v. Hartung**, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981)). The trial court's reliance on an accountant, who opined that corporate repayment of a loan to Raz was a proper addition to Raz's income available for child support, is a factual finding which is reasonably supported by the record. Additionally, the definition of "gross income" found in WIS. ADM. CODE § HSS 80 includes voluntary deferred compensation. Raz's decision to give the company he owns[6] a loan which the company subsequently repaid falls within this definition.

Last, we address Brown's request that fees and costs be assessed against Raz pursuant to § 809.25(3), STATS., the frivolous appeal statute. Brown argues that Raz knew or should have known that his

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[5] Raz's objection is rendered somewhat disingenuous by his later desire to abandon this argument if the appellate court would set child support at $600 per month.

[6] Raz owns 94% of the stock.

appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. We decline to assess costs against Raz. Although the similarities between the facts of this case and the facts of **Luciani** are striking, they differ in one respect; in this case, both parties had high incomes. Additionally, although he did not succeed, Raz attempted to show, as **Luciani** admonished, that his children would be harmed by the income disparity. These are significant distinctions.

By the Court.— Order affirmed.

STATE OF WISCONSIN | CIRCUIT COURT FAMILY COURT BRANCH | MILWAUKEE COUNTY

In re the marriage of:

JAN RAZ,

Petitioner,

-and-

MARY BROWN, D.D.S.,

Respondent.

FILED
JUNE 7 1996
GARY J. BARCZAK
CLERK OF CIRCUIT COURT

FINDINGS AND ORDER AMENDING JUDGMENT

Case No. 90-FA-903-638

Date and Place of Hearing: April 23 and 24, 1996
Milwaukee County Courthouse
901 North Ninth Street
Milwaukee, WI 53202

Presiding: Honorable Gary A. Gerlach
Circuit Court Judge, Br. 29

Appearances: Petitioner in person, Pro se
Respondent in person and by her Attorney, Randolph E. House

FINDINGS

1. The petitioner's gross income for 1995 is $108,384.00, which is the baseline upon which calculations should be made or derived under HSS standards.

2. Dr. Brown's income is $114,516.00 for 1995, including capital gains, earned income and dividend income.

3. Both parties are capable of earning more money if they would like.

4. Both parties have between 1 and 1.5 million dollars in assets.

5. The petitioner has expenses of $3,840.00 per month, which includes expenses for the minor children.

6. After adjustment for real estate property taxes which were double counted on her Financial Declaration, the Court finds that Dr. Brown's monthly expenses for herself and the children are $4,920.00; the Court finds nothing extraordinary in her budget.

7. The petitioner's child support obligation is 25% of his gross income, which should be appropriately reduced by 20%, taking into consideration HSS calculations, wherein the petitioner has the shared placement 36% of the time. Application of this formula results in a child support obligation of $1,806.00 per month.

8. After payment of child support, Mr. Raz will have net disposable income of $4,250.00 per month and Dr. Brown will have disposable income of $8,253.00 per month.

9. There is nothing in the record that demonstrates that application of the child support standards and application of HSS 80 is unfair to the children in any respect.

10. There is nothing in the record to show that because mother has more available cash, the children are being influenced or being mislead or alienated from father because mother has more money to spend on them.

11. There is no evidence in this record which indicates any harm to the children because mother has more disposable income.

12. There is nothing in the record to show that father cannot live at a standard which he is used to; the available money after HSS 80 standards are applied is in excess of his budget as set forth on this record.

13. The petitioner has not met his burden to show by the greater way [sic] of the credible evidence that it would be unfair in this case to apply the standards; and the Court is therefore, compelled to follow the Supreme Court per *Luciani*. The court has considered the statutory factors set forth as follows:

(a) The children are well off. They each have substantial funds in their trusts for their educations. They are more than financially taken care of both now and in the future.

(b) Both parents have abundant financial resources.

(c) Maintenance is not involved in this case.

(d) Parties have adequate funds to support themselves over the poverty level.

(e) Children are enjoying the standard of living they would have enjoyed had the marriage not ended.

(f) There are no day care costs.

(g) The father's substantial periods of physical placement have been taken into consideration.

(h) There are no extraordinary travel expenses.

(i) There are no extraordinary physical, mental or emotional needs of the children.

(j) The childrens' educational needs are taken care of.

(k) The tax consequences have been considered pursuant to the Mac Davis calculations, which are part of this record.

(l) Both parties are capable of earning even more income than that which was found by the Court.

The parties stipulated in open court that it was no longer necessary for the wife to take from her child support award of $100.00 per month for each child and set it aside for education purposes.

14. It is fair that each party take one of the minor children for dependency exemptions; the petitioner shall have the youngest child for this purposes [sic]; the respondent shall have the older child for this purpose.

UPON ALL RECORDS, FILES AND PROCEEDINGS HERETOFORE HAD AND TAKEN, AND UPON THE ABOVE FINDINGS;

IT IS ORDERED

1. That the petitioner shall pay to the respondent child support in the amount of $1,806.00 per month commencing April 18, 1995;

2. That the arrearage of record, in the amount of $3,672.00 is based upon the difference between the Order of Commissioner Frinzi entered in May 1995, in the amount of $1,500.00, and this Court's Order of $1,806.00.

3. The arrearages shall be paid through the Clerk of Circuit Court for Milwaukee County forthwith.

4. Pursuant to Stipulation, the respondent shall not be obligated to deposit $200.00 per month into educational trusts for the minor children.

5. The petitioner shall be entitled to claim the youngest child as a dependency exemption for tax purposes; the respondent shall be entitled to claim the older child as a dependency exemption for tax purposes.

6. In all other respects, the Judgment and any other outstanding orders not modified by this order shall remain in full force and effect.

Dated at Milwaukee, Wisconsin this 7th day of June, 1996.

BY THE COURT:

/s/ GARY A GERLACH
HONORABLE GARY A. GERLACH
Circuit Court Judge

TITLE 45--PUBLIC WELFARE

(CHILD SUPPORT ENFORCEMENT PROGRAM), ADMINISTRATION FOR CHILDREN AND FAMILIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 302--STATE PLAN REQUIREMENTS

Sec. 302.56 Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the absent parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

[[Page 220]]

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the

guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19649, May 9, 1985; 50 FR 23958, June 7, 1985, as amended at 51 FR 37731, Oct. 24, 1986; 56 FR 22354, May 15, 1991]

Wisconsin Administrative Code
Chapter HSS 80
CHILD SUPPORT PERCENTAGE OF INCOME STANDARD

HSS 80.01 Introduction
HSS 80.02 Definitions
HSS 80.03 Support orders
HSS 80.04 Determining the child support obligation in special cases
HSS 80.05 Determining imputed income for child support.

PREFACE

Section 46.25 (9) (a), Stats., requires the department to adopt and publish a standard to be used by courts in determining child support obligations. The standard is to be based on a percentage of the gross income and assets of either or both parents.

The percentage standard established in this chapter is based on an analysis of national studies, including a study done by Jacques Van der Gaag as part of the Child Support Project of the Institute for Research on Poverty, University of Wisconsin, Madison, entitled "On Measuring the Cost of Children," which disclose the amount of income and disposable assets that parents use to raise their children. The standard is based on the principle that a child's standard of living should, to the degree possible, not be adversely affected because his or her parents are not living together. It determines the percentage of a parent's income and potential income from assets that parents should contribute toward the support of children if the family does not remain together. The standard determines the minimum amount each parent is expected to

contribute to the support of their children. It expects that the custodial parent shares his or her income directly with their children. It also presumes that the basic needs of the children are being met. This latter presumption may be rebutted by clear and convincing evidence that the needs of the children are not being met.

The rules also prescribe procedures for determining equitable child support obligations under a variety of financial and family circumstances.

HSS 80.01 Introduction. (1) AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of s. 46.25 (9) (a), Stats., for the purpose of establishing a standard to be used in determining child support under ss. 767.02, 767.08, 767.10, 767.23, 767.25, 767.32 and 767.51, Stats.

(2) APPLICABILITY. This chapter applies to any petition for a temporary or final order for child support of a marital or nonmarital child in an action affecting a family under s. 767.02, Stats., any stipulated child support settlement under s. 767.10, Stats., or any revision of judgment under s. 767.32, Stats.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; r. (2) (b) to (d), Register, August, 1987, No. 380, eff. 9-1-87; am. (1), r. and recr. (2), Register, February, 1995, No. 470, eff. 3-1-95.

HSS 80.02 Definitions. In this chapter:

(1) "Acknowledgement of paternity" means both the mother and the father voluntarily signed and filed a form under s. 69.15 (3) (b) 1 or 3, Stats., with the state registrar.

(2) "Adjusted base" means the monthly income at which the child support obligation is determined for serial family payers, which is the payer's base less the amount of any existing legal obligation for child support.

(3) "Assets available for imputing income" means all real or personal property over which a payer can exercise ownership or control, including but not limited to, life insurance, cash and deposit accounts, stocks and bonds, business interests, net proceeds resulting from worker's compensation or other personal injury awards not intended to replace income, and cash and corporate income in a corporation in which the payer has an ownership interest sufficient to individually exercise control and when the cash or corporate income is not included as gross income under s. HSS 80.02 (13).

(4) "Base" means the monthly income at which the child support obligation is determined, which is calculated by adding together the payer's gross income and the payer's imputed income for child support, and dividing by 12.

(5) "Child" means the natural or adopted child of the payer.

(6) "Child support" or "child support obligation" means an obligation to support a marital child either in an intact family

or as a result of a court order, an obligation to support the payer's nonmarital child as a result of a court order, or an obligation to support the payer's nonmarital child in an intact family as a result of adoption, maternity or an acknowledgement of paternity.

(7) "Court" means a circuit court judge or family court commissioner.

(8) "Current 6-month treasury bill rate" means the yield of a U.S. government security with a term of 6 months.

(9) "Department" means the Wisconsin department of health and social services.

(10) "Dependent household member" means a person for whom a taxpayer is entitled to an exemption for the taxable year under 26 U.S.C. § 151.

(11) "Family support" means an amount which a person is legally obligated to pay pursuant to an order under s. 767.261, Stats., as a substitute for child support under s. 767.25, Stats., and maintenance payments under s. 767.26, Stats.

(12) "Federal dependency exemption" means the deduction allowed in computing taxable income pursuant to 26 U.S.C. § 151 for a child of the taxpayer who has not attained the age of 19 or who is a student.

(13) "Gross income" means:

(a) All income considered federal gross income under 26 CFR 1.61-1;

(b) Net proceeds resulting from worker's compensation or other personal injury awards intended to replace income;

(c) Unemployment compensation;

(d) Income continuation benefits;

(e) Voluntary deferred compensation, employe contributions to any employe benefit plan or profit-sharing, and voluntary employe contributions to any pension or retirement account whether or not the account provides for tax deferral or avoidance;

(f) Military allowances and veterans benefits;

(g) Undistributed income of a corporation, including a closely-held corporation, or any partnership, including a limited or limited liability partnership, in which the payer has an ownership interest sufficient to individually exercise control or to access the earnings of the business, unless the income included is an asset under sub. (3);

Note: Income considered under this subsection is subject to the adjustments under s. HSS 80.03 (2).

(h) Any income imputed to the payer under s. HSS 80.05; and

(i) All other income, whether taxable or not, except that gross income does not include public assistance or child support received from previous marriages or from paternity adjudications.

(14) "Gross income available for child support" means the amount of gross income after adding wages paid to dependent household members and subtracting business expenses which the court determines are reasonably necessary for the production of that income or operation of the business and which may differ from the determination of allowable business expenses for tax purposes.

(15) "Imputed income for child support" means the amount of income ascribed to assets which are unproductive or to which income has been diverted to avoid paying child support or from which income is necessary to maintain the child or children at the economic level they would enjoy if they were living with both parents, and which exceeds the actual earnings of the assets.

(16) "Intact family" means a family in which the child or children and the payer reside in the same household and the payer shares his or her income directly with the child or children and has a legal obligation to support the child or children.

(17) "Legal obligation for child support" has the meaning prescribed for "child support" or "child support obligation" in sub. (6).

(18) "Marital child" means a child determined to be a marital child under s. 767.60, Stats.

(19) "Parent" means the natural or adoptive parent of the child.

(20) "Parent with less time" means the parent having physical placement of the child less than 182 days a year.

(21) "Parent with more time" means the parent having physical placement of the child more than 183 days a year.

(22) "Payee" means the parent who is the recipient of child support as a result of a court order.

(23) "Payer" means the parent who incurs a legal obligation for child support as a result of a court order.

(24) "Serial family payer" means a payer with an existing legal obligation for child support who incurs an additional legal obligation for child support in a subsequent family as a result of a court order.

(25) "Shared-time payer" means a payer who provides overnight child care or equivalent care beyond the threshold and assumes all variable child care costs in proportion to the number of days he or she cares for the child under the shared-time arrangement.

Note: There are physical placement arrangements in which the payer provides child care beyond the threshold and incurs additional cost in proportion to the time he or she provides care, but because of the physical placement arrangement he or she does not provide overnight care (e.g., payer provides day care while the payee is working). Upon request of one of the parties the court may determine that the physical placement arrangement other than overnight care is the equivalent of overnight care.

(26) "Split custody payer" means a payer who has 2 or more children and who has physical placement of one or more but not all of the children.

(27) "Standard" or "percentage standard" means the percentage of income standard under s. HSS 80.03 (1) which, multiplied by the payer's base or adjusted base, results in the payer's child support obligation.

Note: The standard is based on national studies of the percentage of income used to support a child or children, with adjustment downward of those percentages to reflect costs incurred by the payer for what used to be called visitation under Wisconsin law and is now called physical placement and to maintain health insurance for the child or children.

(28) "Threshold" means 30% of a year or 109.5 out of every 365 days.

Note: The threshold was derived by taking 30% of a 365 day year.

(29) "Total annual income for child support" means gross income available for child support plus imputed income for child support.

(30) "Variable costs" means costs that include but are not limited to payment for food, clothing, school, extracurricular activities, recreation and day care.

(31) "Worksheet" means the department's percentage standard worksheet, printed as Appendix B to this chapter.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; r. (2) (b) to (d),

r. and recr. (12) to (14), renum. (26) to (28) to be (27) to (29) and am. (29), cr. (26), Register, August, 1987, No. 380, eff. 9-1-87; r. and recr., Register, February, 1995, No. 470, eff. 3-1-95.

HSS 80.03 Support orders. (1) DETERMINING CHILD SUPPORT USING THE PERCENTAGE STANDARD. The payer's base shall be determined by adding together the payer's gross income available for child support under sub. (2), if appropriate, and the payer's imputed income for child support and dividing by 12. This may be done by completing the worksheet in Appendix B, although use of the worksheet for this purpose is not required. The percentage of the payer's base or adjusted base that constitutes the child support obligation shall be:

(a) 17% for one child;

(b) 25% for 2 children;

(c) 29% for 3 children;

(d) 31% for 4 children; and

(e) 34% for 5 or more children.

Note: See Appendix A which indicates the amount of child support at various levels of income using the percentage standard.

(2) GROSS INCOME AVAILABLE FOR CHILD SUPPORT. In determining the payer's base under sub. (1), the court may adjust the gross income by adding wages paid to dependent household members and by reducing gross income by the business expenses which the court determines are reasonably necessary for the production of that income or operation of the business

and which may differ from the determination of allowable business expenses for tax purposes.

(3) SUPPORT OBLIGATION BASED ON EARNING CAPACITY. In situations where the income of the parent obligated to pay child support in accordance with the standard under sub. (1) is less than that parent's earning capacity, or in situations where both parents incomes are considered under s. HSS 80.04 (2) (c) and the income of one parent is less than that parent's earning capacity, the court may establish support by applying the percentage standard to:

(a) An amount determined by the court to represent the payer's ability to earn, based on the payer's education, training and work experience, and the availability of work in or near the payer's community; or

(b) The income a person would earn by working 40 hours per week for the federal minimum hourly wage under 29 U.S.C. § 206 (a) (1).

(4) CALCULATION OF FAMILY SUPPORT. When the standard under sub. (1) is used to calculate support under s. 767.261, Stats., the amount determined shall be increased by the amount necessary to provide a net family support payment, after state and federal income taxes are paid, of at least the amount of a child support payment under the standard.

(5) EXPRESSION OF ORDERED SUPPORT. In temporary, final or revised support orders, the ordered support may be expressed either as a percentage of the base or adjusted base, or as a fixed sum, or as a combination of both as permitted

under ss. 767.23 (1), 767.25 (1), 767.32 and 767.51 (4), Stats.

(6) DEPENDENCY EXEMPTION. The court may order the payee to waive the federal dependency exemption provided that the payee's execution of the exemption waiver is made contingent on the receipt of child support payments.

(7) DEVIATION FROM THE PERCENTAGE STANDARD. (a) Upon request by a party, the court may modify the amount of child support payments determined under sub. (1) if, after considering the factors in s. 767.25 (1m) or 767.51 (5), Stats., as applicable, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties.

(b) If the court under par. (a) modifies the amount of child support payment determined under sub. (1), the court shall state in writing or on the record the amount of support that would be required by using the percentage standard under sub. (1), the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification as provided under ss. 767.25 (1n) (b) and 767.51 (5d) (b), Stats.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; am. (1) (intro.), Register, August, 1987, No. 380, eff. 9-1-87; am. (1) (intro.), renum. (2) to (4) to be (4) to (6) and am. (5), cr. (2), (3), (7), Register, February, 1995, No. 470, eff. 3-1-95.

HSS 80.04 Determining the child support obligation in special circumstances. Child support may be determined under special circumstances as follows:

(1) DETERMINING THE CHILD SUPPORT OBLIGATION OF A SERIAL-FAMILY PAYER. (a) Applicability. This subsection applies only if the additional child support obligation incurred by a payer is the result of a court order and the support obligation being calculated is for children from a subsequent family or subsequent paternity judgment or acknowledgment. A payer may not use the provisions of this subsection as a basis for seeking modification of an existing order based on a subsequently incurred legal obligation for child support.

(b) *Determination.* For a serial-family payer the child support obligation incurred for a marital or nonmarital child in a subsequent family as a result of a court order may be determined as follows:

1. Determine the payer's base under s. HSS 80.03 (1) (intro.);

2. Determine the order of the payer's legal obligations for child support by listing them according to the date each obligation is incurred. For a marital child, the legal obligation for child support is incurred on the child's date of birth. For a nonmarital child, the legal obligation for child support is incurred on the date of the court order. For a nonmarital child in an intact family, it is incurred on the date of adoption or the date of the filing of an acknowledgement of paternity. For a nonmarital maternal child in an intact family, it is incurred on the child's date of birth;

3. Determine the first child support obligation as follows:

a. If the payer is subject to an existing support order for that legal obligation, the support for that obligation is the monthly amount of that order; or

b. If the payer is not subject to an existing support order for that legal obligation, the support is determined by multiplying the appropriate percentage under s. HSS 80.03 (1) for that number of children by the payer's base;

4. Adjust the base by subtracting the support for the first legal obligation under subd. 3 from the payer's base under subd. 1;

5. Determine the second child support obligation as follows:

a. If the payer is subject to an existing support order for that legal obligation, the support for that obligation is the monthly amount of that order; or

b. If the payer is not subject to an existing support order for that legal obligation, the support is determined by multiplying the appropriate percentage under s. HSS 80.03 (1) for that number of children by the payer's base;

6. Adjust the base a second time by subtracting the support for the second legal obligation determined under subd. 5 from the first adjusted base determined under subd. 4;

7. Repeat the procedure under subds. 5 and 6 for each additional legal obligation for child support the serial family payer has incurred;

8. Multiply the appropriate percentage under s. HSS 80.03 (1) for the number of children subject to the new order by the final adjusted base determined in either subd. 6 or 7 to determine the new child support obligation.

Note: The following example shows how the child support obligation is determined for a serial-family payer whose additional child support obligation has been incurred for a subsequent family.

Assumptions:

Parent A's current base is $3000.

Parent A and Parent B were married, had a child in 1980 and divorced in 1989, Parent A is subject to an existing support order of $450 per month.

Parent A remarries and has two children, one born in 1991 and the other in 1992, and remains an intact family.

Parent A was adjudicated the father in 1993 for a child born in 1990. Child support needs to be established for this child.

Order of parent A's legal obligation for child support.

First legal obligation: one child (1980) (divorce)

Second legal obligation: 2 children (1991 and 1992) (intact family)

Third legal obligation: one child (1993) (paternity)

Calculation:

Parent A's current base	$3000
The first legal obligation is subject to an existing monthly support order (divorce)	$ 450
Adjust the base	$3000 - 450
First adjusted base	$2550
Determine support for the second legal obligation (intact family)	$2550 x .25
	$637.50
Adjust the first adjusted base	$2550 - 637.50
Second adjusted base	$1912.50
Determine support for the third legal obligation (paternity)	$1912.50 x .17
	$ 325.12

(2) DETERMINING THE CHILD SUPPORT OBLIGATION OF A SHARED-TIME PAYER. The child support obligation in cases where both parents provide overnight child care beyond the threshold may be determined as follows:

(a) Determine the number of overnights, or the equivalent as determined by the court in accordance with s. HSS 80.02 (25), each parent has the child per year. If the parent with less time has the child at least 110 overnights but not more than 146 overnights, follow the procedure in par. (b). If each parent has the child for at least 147 overnights but for not more than 218 overnights, follow the procedure in par. (c).

(b) In cases where the parent with less time has the child for at least 110 overnights, or the equivalent as determined by the court in accordance with s. HSS 80.02 (25), per year but not more than 146 per year, determine the child support as follows:

1. Determine the child support obligation under s. HSS 80.03 (1) of the parent with less time;

2. Divide by 365 the number of overnights the parent with less time has physical placement of the child to determine the percentage of the year that the parent with less time provides overnight care;

3. If the percentage under subd. 2 is over 30% but not more than 40%, reduce the child support obligation under subd. 1 in accordance with Table 80.04 (2) (b);

TABLE 80.04 (2) (b)

REDUCTION OF SUPPORT OBLIGATION FOR 31% TO 40% TIME WITH CHILD

COLUMN A % of time with child	COLUMN B % of original child support obligation
30	100%
31	96.67%
32	93.34%
33	90.01%
34	86.68%
35	83.35%
36	80.02%
37	76.69%
38	73.36%
39	70.03%
40	66.70%

4. Multiply the child support obligation under subd. 1 by the appropriate percentage from Column B of Table 80.04 (2) (b) to determine the amount of child support due; and

5. Express the amount of child support due identified in subd. 4 either as a percentage or as a fixed sum.

Note: The following example shows how to calculate the amount of child support for a shared-time payer who has physical placement of the child more than 30% of the year but not more than 40% of the year.

Assumptions:

Number of children: One

Parent with less time: $2,000 gross income/month

Assumes child-caring responsibility for 138 days

Parent with more time: $1,500 gross income/month

Assumes child-caring responsibility for 227 days

Calculation:

The child support obligations of the parent with less time = $2,000 x 17% = $340/month.

Percentage of the year that the parent with less time provides overnight care = 138 days + 365 days = .378 or 38%.

The percentage of the original child support obligation for the parent with less time using Table 80.04 (2) (b) = 73.36%.

The child support owed by the parent with less time = $340 x 73.36% = $249.42.

The percentage of income of the parent with less time = $249.42 + $2,000 = .1247 or 12.5%.

(c) In cases where each parent has the child for at least 147 overnights per year, or the equivalent as determined by the court in accordance with s. HSS 80.02 (25), but not more than 218 overnights per year, determine the child support as follows:

1. Determine the child support obligation under s. HSS 80.03 (1) of each parent as if a payer;

2. For each parent, divide the number of overnights that the parent has physical placement of the child by 365 to determine the percentage of the year that the parent provides overnight care;

3. If for a parent the percentage under subd. 2 is over 40% but not more than 59%, reduce the child support obligation for that parent in accordance with Table 80.04 (2) (c), and then do the same for the other parent:

TABLE 80.04 (2) (c)

REDUCTION OF SUPPORT OBLIGATION FOR 41% TO 59% TIME WITH CHILD

COLUMN A % of time with child	COLUMN B % of original child support obligation
41	63.37%
42	60.04%
43	56.71%
44	53.38%
45	50.05%
46	46.72%
47	43.39%
48	40.06%
49	36.73%
50	33.40%
51	30.07%
52	26.74%
53	23.41%
54	20.08%
55	16.75%
56	13.42%
57	10.09%
58	6.76%
59	3.43%
60	0.00%

4. For each parent, multiply the child support obligation for that parent under subd. 1 by the appropriate percentage from Column B of Table 80.04 (2) (c) to determine the amount of child support due from that parent;

5. Subtract the lesser child support obligation under subd. 4 from the greater child support obligation under subd. 4 to determine the final amount of child support due, and the payer. The resulting payer may be either parent.

6. Express the amount of child support due either as a percentage or as a fixed sum.

Note: The following example shows how to calculate the amount of child support for a shared-time payer who has physical placement of the child for more than 40% but less than 60% of the year.

Assumptions:

Number of children: One

Parent A: $2,000 gross income/month

Assumes child-caring responsibility for 160 days

Parent B: $1,500 gross income/month

Assumes child-caring responsibility for 205 days

Calculation:

Parent A's child support obligation = $2,000 x 17% = $340/month.

Parent B's child support obligation = $1,500 x 17% = $255/month.

The percentage of the year that parent A provides overnight care = 160 days + 365 days = .438 or 44%.

The percentage of the year that parent B provides overnight care = 205 days + 365 days = .561 or 56%.

Using Table 80.04 (2) (c): Parent A's percentage of the original child support obligation = 53.38%.

Using Table 80.04 (2) (c): Parent B's percentage of the original child support obligation = 13.42%.

The amount of child support parent A owes = $340 x 53.38% = $181.49.

The amount of child support parent B owes = $255 x 13.42% = $34.22.

The payer and the final amount of child support owed = $181.49 - $34.22 = $147.27 owed by parent A.

The percentage of parent A's income owed as child support = $147.27 + $2,000 = .0736 or 7.36%.

(3) DETERMINING THE CHILD SUPPORT OBLIGATION OF A SPLIT-CUSTODY PAYER. (intro.) For a split-custody payer, the child support obligation may be determined as follows:

(a) Determine the payer's base in accordance with s. HSS 80.03 (1) (intro.) for calculating the amount of child support.

(b) Multiply the payer's base established under par. (a) by the appropriate percentage under s. HSS 80.03 (1) for the number of children in the payee's custody to determine the payer's child support obligation in dollars.

(c) Determine the payee's base in accordance with s. HSS 80.03 (1) (intro.) for calculating the amount of child support.

(d) Multiply the payee's base established under par. (c) by the appropriate percentage under s. HSS 80.03 (1) for the number of children in the payer's custody to determine the payee's child support obligation.

(e) Subtract the smaller child support obligation from the larger to determine the reduced amount of child support owed by the parent with the larger child support obligation.

Note: The following example shows how to calculate the amount of child support for a split-custody payer:

Assumptions:

The payer is divorced and has 3 children;

The payer has custody of one child;

The payer's monthly gross income is $3,000;

The payee has custody of 2 children; and

The payee's monthly gross income is $1,500.

Calculation:

The payer's base $3,000	
The payer's original child support obligation (25% x $3,000)	750
The payee's base	1,500
The payee's original child support obligation (17% x $1500)	255
The payer owes the payee (750 - 255)	$495

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; am. (1) (a),(b) (intro.) and 1., (3) (intro.), (a) and (c), r. and recr. (2), Register, August, 1987, No. 380, eff. 9-1-87; r. and recr. (1), (2), Register, February, 1995, No. 470, eff. 3-1-95.

HSS 80.05 Determining imputed income for child support. For a payer with assets, a reasonable earning potential may be attributed to the assets as follows:

(1) Determine the payer's gross income;

(2) If the court finds that the payer has underproductive assets or has diverted income into assets to avoid paying child support or that income from the payer's assets is necessary to maintain the child or children at the economic level they would have enjoyed if they and their parents had been living together, identify those assets and then impute income to them by multiplying the total net value of the assets by the current 6-month treasury

bill rate or any other rate that the court determines is reasonable; and

(3) Subtract the actual earnings of the assets from the imputed income from the assets to determine the imputed income for child support.

History: Cr. Register, January, 1987, No. 373, eff. 2-1-87; r. and recr. Register, August, 1987, No. 380, eff. 9-1-87; am. (2), Register, February, 1995, eff. 3-1-95.

LUCIANI v. MONTEMURRO-LUCIANI,
199 Wis.2d 280 (1996)
544 N.W.2d 561

IN RE the MARRIAGE OF: Michael A. LUCIANI,
Petitioner-Appellant,
v.

Angelina MONTEMURRO-LUCIANI,
Respondent-Respondent-Petitioner.

Supreme Court

No. 93-2899. Oral argument November 1, 1995 -- Decided March 7, 1996.

(Affirming in part and reversing in part 191 Wis.2d 67, 528 N.W.2d 477 (Ct.App. 1995).)

Page 284

REVIEW of a decision of the Court of Appeals. *Affirmed in part and reversed in part.*

For the respondent-respondent-petitioner there was a brief by *Donald E. Mayew*, and *Phillips, Richards, Mayew & Corrigall, S.C.*, Kenosha and oral argument by *Donald E. Mayew*.

For the petitioner-appellant there was a brief by *Thomas W. Anderson, Jr.* and *Anderson, Sumpter & Anderson, S.C.*, Kenosha and oral argument by *Thomas W. Anderson, Jr.*

JON P. WILCOX, J. This is a review of a published decision of the court of appeals which affirmed in part and reversed in part the judgment of divorce granted in the circuit court for Kenosha County, Bruce E. Schroeder, Judge. *See*

Luciani v. Montemurro-Luciani, 191 Wis.2d 67, 528 N.W.2d 477 (Ct.App. 1995). The court of appeals affirmed the circuit court's maintenance provision requiring the respondent-appellant
Page 285
Dr. Angelina Montemurro-Luciani (Dr. Montemurro) to pay the appellant-respondent Michael A. Luciani (Luciani) $1,000 per month for 36 months. It reversed the income tax exemption provision as well as the circuit court's child support award based on the statutory percentage guideline standards requiring Luciani to pay 24% of his income to Dr. Montemurro for support for the parties' two minor children. *Id.* at 72-73.

The issue we consider on review is whether the circuit court erroneously exercised its discretion when it did not deviate from the percentage guideline standards, where the payee earns a substantially greater income than the payer. We hold that in the case of a high-income payee, the percentage standards set by administrative regulation[1] presumptively apply, absent a payer's showing of unfairness by the greater weight of the credible evidence. We conclude that the circuit court did not err in applying the percentage standards, and therefore reverse that part of the decision of the court of appeals addressing the issue of child support. We affirm the court of appeals' decision regarding the award of maintenance as well as the tax exemption provision.

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[1] *See* Wis. Admin. Code § HSS 80.03 (June 1993).

The couple, Luciani and Dr. Montemurro, were married in 1986, each at age 32. Dr. Montemurro was in the second year of her medical residency program when the parties were married. In 1988, upon the completion of this program, Dr. Montemurro established her own private medical practice in Kenosha. Luciani was employed as a lab technician at Modine Manufacturing Company in Racine throughout the course of the marriage. The income tax returns for 1987 reported
Page 286
near equal earnings of $22,000 for both parties. However, as Dr. Montemurro's medical practice began to expand, so too did the disparity between the parties' respective incomes:

	Luciani	Dr. Montemurro
1987	$ 22,000	$ 22,000
1988	26,571	14,273
1989	25,789	69,060
1990	31,342	121,809
1991	29,393	131,915
1992	33,177	132,857[2]

The divorce action was filed on June 6, 1991. The marriage had produced two children, ages four and three at the time of the trial, who reside with Dr. Montemurro. The circuit court approved the parties' stipulation to joint legal

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[2] As noted by the court of appeals, the figures provided above are understated in some years in comparison to the gross income reported on the parties' W-2 forms. Both Luciani and Dr. Montemurro took advantage of available contributions to a retirement plan as well as a tax deferred stock plan. *Luciani*, 191 Wis.2d at 72 n.1.

custody and primary physical placement with Dr. Montemurro. The children's physical placement with Luciani is approximately 117 overnights per year, consisting of 32% of the overnight placement, and an additional 49 nonovernight days per year. Dr. Montemurro has the children for the remaining 68% of the overnight placement.

In January 1993, a trial was held in this matter involving a number of issues including property division, debt allocation, attorney's fees, beneficiary designations, and placement of the children during certain holiday periods. We are primarily concerned on
Page 287
this review with the nature of the dispute regarding the proper amount of child support Dr. Montemurro is entitled to receive as the high-income payee with custody of the children a majority of the time.

Dr. Montemurro argued that the circuit court was required, in accordance with Wis. Stat. § 767.25(1j) (1993-94),[3] to determine the proper amount of child support payments according to the percentage standards established by the Department of Health and Social Services (DHSS). *See* Wis. Admin. Code § HSS

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[3] Section 767.25(1j) provides:

> Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department of health and social services under s. 46.25(9).

80.03(1)(b) (June 1993).[4] Additionally, she urged the circuit court to calculate Luciani's support obligations pursuant to the shared-time payer provision of the child support percentage standard under Wis. Admin. Code §§ HSS 80.02(23) and HSS 80.04(2) (June 1993). In accord with this method, Dr. Montemurro requested an annual support amount of $8,133.84, or approximately 24% of Luciani's gross income.[5]
Page 288

Luciani argued that the circuit court should not apply the percentage standards in this case. Asserting that the court should consider the substantial physical placement of the children with him

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[4] Section HSS 80.03(1)(b) provides:

> Determining child support using the percentage standard . . . . The percentage of the payer's base or adjusted base that constitutes the child support obligation shall be:
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> . . .
>
> (b) 25% for 2 children;

[5] Application of the straight percentage standards would require Luciani to pay 25% of his gross income towards child support. However, because Luciani has the children for 32% of the overnight placement, the court is required to reduce this figure in accord with the "shared-time" formula provided in § HSS Table HSS 80.04(2)(b) (i.e., 93.34%). Luciani's proper support obligation is therefore 24% of his gross income.

pursuant to the parties' stipulation and the significant disparity between the parties' incomes, Luciani maintains that the court should have deviated from the presumptive application of the percentage standards, as allowed under Wis. Stat. § 767.25(1m) (1993-94).[6] In determining whether to deviate from the standards, the statute sets out 16 factors for the court to consider when addressing this question. *See* § 767.25(1m)(a)-(i) (1993-94). If the court finds that application of the percentage standards would be unfair, Wis. Stat. § 767.25(1n) (1993-94)[7] requires the

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[6] Section 767.25(1m) provides:

> Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:
>
> . . . .

[7] Section 767.25(1n) provides:

> If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, the court shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from

court to state in writing or on the record the alternative support amount, as well as the basis for the modification. Luciani claimed that applying the percentage standards in this case would be fundamentally unfair, as Dr. Montemurro's income

Page 289

greatly exceeded his own. Luciani proposed that the court obligate each party to provide necessary support while the children were physically placed with each respective parent.

Following the trial, a judgment of divorce was granted on September 22, 1993. In the initial decision issued by the circuit court, Luciani's child support obligation was established by straight application of the percentage standards, although it did not specify a precise dollar amount. The particular subsection of the circuit court's decision regarding child support is provided in full:

> While there is certainly a huge disparity in the incomes of these two parties, there is nothing in the evidence which would warrant a finding that unfairness will result to Dr. Montemurro, Mr. Luciani or the children by application of the legally-prescribed formula for computing the child support obligation. Indeed, I feel that deviation would have a strong

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that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

> potential for damage to the relationship of the parties: of Dr. Montemurro feeling that Mr. Luciani's parental rights are diminished because she is carrying the whole financial load; of the children feeling that their father is less important than their mother or disinterested in them or unwilling to sacrifice for them; of Mr. Luciani feeling that he is not carrying his fair share. All of these can be avoided with Mr. Luciani paying support in accord with the formula, and it is therefore adopted as the Court's order.

In response to concerns expressed by the parties in letter briefs following the decision, the circuit court thereafter issued a supplemental decision clarifying that Luciani's support obligation was in fact intended to be based on the shared-time provisions of the Administrative
Page 290
Code, thereby reducing his support to 24% of gross income based on the percentage of overnight placement attributed to him. In addition, the court confirmed its initial decision that there was no evidence or testimony presented that would warrant a finding that employment of the percentage guideline standards would be unfair to the children or either party. The court rejected Luciani's request to deviate based upon a claim of unfairness.

In support of its original decision to adhere to the percentage standards, the circuit court examined several of the statutorily identified factors which would

permit deviation if demonstrated by the greater weight of the credible evidence. See Wis. Stat. § 767.25(1m)(a)-(i) (1993-94). The court articulated its analysis of such factors by noting that there was no evidence presented that the children's welfare would suffer, that either party lacked financial resources sufficient to make the prescribed support contributions, or that Luciani would be unable to support himself at the same level he enjoyed during the marriage after payment of the child support. Moreover, the court stated that it had considered the cost of daycare, the substantial period of physical placement with Luciani and Dr. Montemurro's far greater earning capacity. Declining to deviate from the percentage standards, the court further stated:

> It is important to note that while it may appear to some that it is "unfair" for Mr. Luciani to be required to pay such a large percentage of his income when his ex-wife is earning a much higher income, that this is no more "unfair" than it is for someone who earns the same salary as Mr. Luciani and who also lives apart from two children to pay
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> Page 291
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> far more than Mr. Luciani because his ex-wife earns far less than Dr. Montemurro. In affirming this decision, the circuit court also reiterated the non-economic considerations encompassed in the initial decision relating to the potential damage to the parties' relationship and the negative

> perception of Luciani that may have been harbored by the children if the court were to deviate from application of the percentage standards. Along with the order for child support, the circuit court ordered Dr. Montemurro to pay Luciani $1,000 per month in maintenance for 36 months.

Luciani appealed the circuit court's order. The court of appeals affirmed the issue of maintenance but reversed the child support portion of the decision. The court of appeals criticized the initial decision, expressing dissatisfaction with the circuit court's principal reliance on the non-statutory, non-economic concerns rather than an in-depth economic analysis of the raw financial data available in the record. *Luciani*, 191 Wis.2d at 76.

The court of appeals expressed similar concern with the supplemental decision as well. The court concluded that it was couched in non-statutory conclusionary language that lacked the appropriate examination of the disparate incomes and the financial effects of substantial physical placement with Luciani. *Id.* at 76. Furthermore, the court expressed a troubling concern with its reading of the circuit court's decision as stating that the disparity between the parties' incomes has no bearing on the question of adherence to the percentage standards. *Id.* at 76-77. The court voiced its disagreement with such a proposition, noting that *Hubert v. Hubert*, 159 Wis.2d 803, 465 N.W.2d 252 (Ct.App. 1990) had specifically cautioned against

Page 292

the robotistic use of the percentage

standards, especially in high-income cases.[8] *Id.* at 814.

The appellate court's decision concluded that the circuit court "erred in the exercise of its discretion by treating the parties' disparate incomes as an irrelevant factor and by failing to analyze the economic consequences of the support order in light of the parties'
Page 293
budgets, incomes and nearly equal child placement[9] provisions."[10] *Id.* at 77-78.

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[8] The court of appeals recognized that this particular case was the converse of the *Hubert* decision, as here the payee (Dr. Montemurro), not the payer (Luciani), was the high-income earner. Nevertheless, the court stated that consideration of "the earning capacity of each parent" was an express factor under Wis. Stat. § 767.25(1m)(hs) (1993-94) to be considered upon a request to deviate from the percentage standards, and disagreed with its reading of the circuit court treatment of the issue as irrelevant.

[9] The court of appeals' representation of the child placement as 'nearly equal' is unsupported by the record. Under the shared-time payer formula, the determinative criteria utilized to calculate a child support obligation is overnight care. In this case, Luciani has the children for a total of 117 overnights and 49 nonovernight days per year. *See* discussion, at p. 3. The record illustrates that during the 49 nonovernight days, Luciani has the children for only one-sixth of the day (4 hours), while Dr. Montemurro is responsible for the remaining five-sixths

(20 hours). The court of appeals has mistakenly considered the 117 and 49 figures collectively ((117+49)/365)= 45%) to characterize Luciani's placement obligation as 'nearly equal.' In fact, the children's total overnight placement with their father is less than one-third. Even if one were to consider the supplementary hours generated as a result of the additional 49 nonovernight days per year (196 hours), the total physical placement with the father would equal only 34%, a figure which cannot fairly be characterized as 'nearly equal' by the court of appeals nor the dissent.

Furthermore, if Luciani had been concerned about the proper calculation of the additional 49 nonovernight days in which he had the children for four hours, he could have sought relief under Wis. Admin. Code § HSS 80.02(25) (June 1993) which recognizes that physical placement arrangements exist where additional costs are incurred, but no overnight care is provided. The note to this subsection therefore provides: "[u]pon request of one of the parties the court may determine that the physical placement arrangement other than overnight care is the equivalent of overnight care." No such request was made in the present case.

[10] The court of appeals did note, however, that it was not concluding that the shared-time provisions of the percentage standards were not applicable in this case, rather, because the circuit court did not adequately analyze the financial data, it failed to provide substantial reasons for adherence to the guidelines. *Luciani*, 191 Wis.2d at 78.

The determination of appropriate child support is committed to the sound discretion of the circuit court. *Weidner v. W.G.N.*, 131 Wis.2d 301, 315, 388 N.W.2d 615 (1986); *Prosser v. Cook*, 185 Wis.2d 745, 751, 519 N.W.2d 649 (Ct.App. 1994). Whether the trial court properly exercised its discretion is a question of law. *Seep v. Personnel Comm'n*, 140 Wis.2d 32, 38, 409 N.W.2d 142 (Ct.App. 1987). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v. Gudenschwager*, 191 Wis.2d 432, 440, 529 N.W.2d 225 (1995); *see also Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982); *Stephen L.N. v. Kara L.H.*, 178 Wis.2d 466, 477, 504 N.W.2d 422 (Ct.App. 1993).

The circuit court is required to determine the appropriate award of child support by application of the percentage standards mandated under Wis. Stat. § 46.25(9) (1993-94) as established in § HSS 80.04(2). *See* Wis. Stat. § 767.25(1j) (1993-94). In *Weidner*, this court referred to the Department of Health and Social Services Memorandum to Members of the Wisconsin Judiciary in interpreting the proper application of the child support percentage standards:

> According to the Department, these percentage standards are an evidentiary shortcut for establishing the need of the child for support. The

> standards, establish '. . . the cost of maintaining a child as an
> Page 295
> equivalent to that percentage of the family income and disposable assets that a parent shares with children in his or her custody.'

Weidner, 131 Wis.2d at 318 (citing *DHSS Memorandum to Members of the Wisconsin Judiciary*, December 20, 1983, Attachment I at 3). This court's recent decision in *Grohmann v. Grohmann*, 189 Wis.2d 532, 525 N.W.2d 261 (1995) clarified the presumptive nature of the percentage standards where we stated: "[a]bsent a showing of unfairness, courts must determine a parent's child support obligation by using the percentage standard established by the Department of Health and Social Services . . . ." *Id.* at 536.

The framework of the statute permits the court to modify the otherwise presumptive calculation if it is demonstrated by the greater weight of the credible evidence that application of the percentage standards would be unfair to the children or either of the parties, *see* Wis. Stat. § 767.25(1m) (1993-94). When presented with a party's challenge to application of the percentage standards, circuit court judges in exercising their discretion, are to consider the statutory factors set forth by the legislature in Wis. Stat. § 767.25(1m), and articulate the basis for their decision to either remain within the guidelines or allow a modification. The circuit court's articulation of its reasoning process is essential in reaching a reasonable determination and to aid this

court in reviewing the discretionary decision. See *Haugan v. Haugan*, 117 Wis.2d 200, 215, 343 N.W.2d 796 (1984).[11] The burden of proof before the
Page 296
court lies with the party requesting the modification under the percentage

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[11] The court of appeals' decision in *Schnetzer v. Schnetzer*, 174 Wis.2d 458, 497 N.W.2d 772 (Ct.App. 1993) attempted to clarify the burden on the circuit courts when strictly applying the percentage standards. The *Schnetzer* case dealt with a post-judgment child support modification action, in which Mr. Schnetzer contended that the circuit court had abused its discretion in applying the percentage standards. The appellate court held that the factors provided in Wis. Stat. § 767.25(1m) (1989-90) "need to be demonstrably considered only where the trial court deviates from the percentage standards." *Id.* at 463. Rather, where the court elects "not to deviate from the percentage standards, the court, in exercising its discretion, need only articulate its reason and base its decision on facts of record and the correct legal standard." *Id.* We find that the above-quoted language improperly suggests that a circuit court, in considering a party's challenge to the presumptive application of the percentage standards, is not required to articulate its analysis of the statutory factors found in Wis. Stat. § 767.25(1m), except where it decides to deviate from the guidelines. This interpretation of the proper role of the circuit court is contrary to our holding in the present case, and we therefore overrule the language expressed in *Schnetzer*.

standards.

Dr. Montemurro challenges the court of appeals' decision to reverse the child support award on two fronts. First, she argues that Luciani failed to prove by the greater weight of the credible evidence that application of the percentage standards resulted in unfairness to him. Secondly, she asserts that the court of appeals' decision has held that in high-income cases, the circuit court must make a threshold determination that the guidelines are to be utilized, rather than presumptively applying the percentage standards. She asserts that this represents an improper, judicially-legislated shift in the prescribed methodology that the percentage standards presumptively apply unless a showing of unfairness has been established.

Here, the circuit court exercised a rational mental process in examining the list of factors provided under
Page 297
Wis. Stat. § 767.25(1m) (1993-94) which produced a reasonable conclusion that application of the 24% child support obligation would not be unfair to Luciani. The court's supplemental decision provides a discussion of the statutory factors at length, and makes a number of factual determinations which support its decision that the evidence in the record did not warrant a finding of unfairness. The circuit court's findings included the following: (1) the parties were not lacking financial resources sufficient to make the prescribed contributions for the welfare and support of the minor children; (2) Luciani had submitted no evidence to show that he will be unable to support

himself at a level equal to that enjoyed during the marriage after payment of the child support obligation; (3) Luciani was under no obligation to support any other person; (4) financially, the children would not be reduced to a lower living standard than that enjoyed during the marriage; (5) the cost of daycare had been considered by the court; (6) the payment of health insurance premiums imposed no substantial burden on Luciani; (7) the period of physical placement with Luciani had been considered by the court, and (8) the far greater earning capacity of Dr. Montemurro had also been considered.

In addition, the court reiterated the previously mentioned non-economic relationship concerns expressed in the initial decision of April 8, 1993. The court found these facts pertinent to the mental and emotional development of the children, and considered them as other factors relevant to the determination of what was in their best interest. *See* Wis. Stat. § 767.25(1m)(i). The circuit court therefore balanced the welfare of the children against any perceived unfairness to Luciani in reaching a reasoned conclusion from the facts of the record. Page 298

Dr. Montemurro argues that the circuit court made appropriate findings of the relevant child support factors to support the monetary award under Wis. Stat. § 767.25(1m), and that Luciani failed to demonstrate by the greater weight of the credible evidence that unfairness would result if the percentage standards were employed. She distinguishes the court of appeals' reliance upon the language in *Hubert* by arguing that although this is a high-income case, the

support award does not so far exceed the needs of the child so as to produce an absurd result.

In *Hubert*, the ex-wife of a cardiac surgeon with an annual income of over $1,000,000 asked the circuit court to determine child support by straight application of the percentage standards. The circuit court determined that such application would be unfair to the husband, and modified the award accordingly.[12] Hubert, 159 Wis.2d at 814. The court of appeals reversed, holding that the circuit court had failed to consider several factors weighing against deviation, including the economic level the children would have enjoyed had the marriage continued. *Id.*

Relying on *Parrett v. Parrett*, 146 Wis.2d 830, 841-42, 432 N.W.2d 664 (Ct. App. 1988) for the proposition that courts may deviate from the percentage standards if an award will exceed the children's needs, the court of appeals noted that "[w]e agree that in cases where the parties have a substantial marital estate and income far beyond the average income of most people, the robotistic utilization of the percentage standards may give absurd results." *Hubert*, 159 Wis.2d at 814.
Page 299
The language in *Hubert* that both Luciani and the court of appeals rely upon came

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[12] The circuit court ordered Mr. Hubert to pay $4,000 per month in child support ($48,000 annually), which was substantially lower than the 25% figure ($250,000 annually) prescribed by the percentage standards.

from the court's recognition that a case may exist where application of the percentage standards would result in a child support award far beyond the child's needs, thereby justifying deviation from the general rule of strict adherence. The facts of the case at bar, however, in light of the lack of evidence presented by Luciani, do not produce the absurd result that is contemplated by the court in *Hubert*. Luciani's challenge to the circuit court's order relates more to his contention that his former wife should bear the total burden of child support simply because of her substantially higher income.[13]

In this case, the circuit court's application of the percentage standards was by no means "robotistic," as suggested by the court of appeals, as it considered the relevant statutory factors in determining Luciani's support obligation.

Luciani, however, maintains that the circuit court failed to consider the disparity of the parties' incomes, as well as the statutory factors, constituting an erroneous exercise of discretion. The essence of Luciani's challenge is that application of the percentage standards in this case will produce an absurd result. He suggests to this court that the record is "replete with evidence" which supports

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[13] We note that Luciani's position on appeal before this court is seemingly contrary to that exhibited at the circuit court level, in which he proposed that the court obligate each party to provide necessary support while the children were physically placed with each respective parent. *See supra*, p. 289.

this claim, and therefore seeks a modification of the child support obligation as determined under Wis. Stat. § 767.25(1j).
Page 300

Reviewing the record in light of Luciani's claim, we examine the evidence presented to the circuit court to demonstrate that unfairness would result. The burden of demonstrating that a modification of the child support award is warranted in a particular case rests with the requesting party, not the circuit court.[14] The evidence presented by Luciani to support his claim for unfairness rests primarily on the figures contained within the financial disclosure statement and his testimony at trial.

In his financial disclosure statement, Luciani represented to the court that his annual childcare expenses (i.e., daycare) would slightly exceed $10,000. However, when questioned about the validity of this figure by opposing counsel, Luciani modified the child care claim to an average of $30 per week or $1,560 per year. He admitted that he has custody of the children on alternating weekends from January through May, and September through December, and therefore incurs no child care expenses during this

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[14] Contrary to Luciani's argument that the issue of his having met his burden of proof has not yet been addressed by the circuit court, we find that it is precisely the issue before us, as we consider whether the circuit court abused its discretion in finding that the record lacked any evidence to support a claim for unfairness.

time. Such expenses would be confined to the months of June and August, during which time Luciani would take vacation, and perhaps his parents visiting from Florida would care for the children, as they had done for an entire summer in the past. These salient factors would significantly reduce the already deflated child care expense estimate offered to the court by Luciani. It is clear that the claimed figures in the financial
Page 301
disclosure statement were not supported by the testimony at trial.

On further cross-examination, a number of additional figures were also reduced. Luciani's claimed housing expense was $1,124.30, but he testified that his actual monthly rent was $650, a fixed cost unaffected by the presence of the children. The claimed utility expense of $195 was reduced to $150. In addition, Luciani testified that he incurred clothing expenses for the children in the amount of $20 per week and approximately $10 per week in medical supplies. This was the extent of the evidence provided by Luciani in support of his request to modify the child support obligation.

In fact, a comprehensive review of the record in this case further evidences testimony by Luciani which seemingly undermines his challenge that the child support order is patently unfair. Luciani initially testified that his annual budget would require a figure of $36,500, based upon income and liabilities in his financial disclosure statement. This computation, however, included the erroneous claim of child care expenses in the amount of $200 per week. As indicated above, Luciani's testimony dramatically

reduced this figure to only $30 per week. Subsequent to being alerted to this discrepancy by opposing counsel, Luciani amended the budget claim to an annual figure of $27,600.

Upon a cursory inspection, this figure would appear to exceed Luciani's after-tax income of $22,000, resulting in the alleged 'forced impoverishment' suggested by the dissent. Dissent, at 311. However, the $22,000 figure significantly underrepresents the income available to Luciani. The dissent has failed to appreciate the fact that he will also receive an

Page 302

additional $12,000 annually ($1,000/month), in the form of maintenance from Dr. Montemurro. When coupled with the $22,000, this "income" will produce an annual budget that exceeds the $27,600 figure that Luciani testified he needed at trial.[15] Moreover, the discretionary

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[15] We note that the circuit court maintenance award is payable for 36 months. Upon the expiration of this period, if Luciani feels that he can no longer meet his child support obligations under the current order, he may seek revision under Wis. Stat. § 767.263 (1993-94) which provides:

> **Notice of change of employer; change of address; change in ability to pay.**
>
> Each order for child support, family support or maintenance payments shall also include an order that the payer notify the clerk of court, within 10 days,

income produced by this maintenance award will certainly allow Luciani to provide the children with gifts, entertainment, and vacations as he sees fit, allaying the relationship concerns expressed by the dissent. Dissent, at 311. We find that the record in this case clearly does not support Luciani's claim of unfairness, nor does it sustain the dissent's conclusion of a 'basic inequity'. Dissent, at 313.[16]

> of any change of employer and of any substantial change in the amount of his or her income such that his or her ability to pay child support, family support or maintenance is affected.

In order to secure such a revision in his child support obligation, Luciani would be required to prove a substantial change in circumstances. *See* Wis. Stat. § 767.32(1) (1993-94). At that time, the judge would then consider the relative change in economic condition along with the statutory factors utilized to calculate child support, and determine if a modification of the child support award is warranted.

[16] The dissent bases this conclusion upon a reference to a 1992 study authored by Melli and Brown, in which they conclude that the shared-time formula produces inequitable results where the non-primary parent's time share approaches equal and where the non-primary parent has a lower income. The example from the study as cited by the dissent, however, is in stark contrast to the facts of the present case regarding placement. In the study case, the father's overnight placement was 190 days, while the mother's was 175, a

The circuit court was next presented with testimony regarding Dr. Montemurro's expenditures for the children as well as a multitude of other expenses. Dr. Montemurro was making regular payments on her medical school loans ($36,000 balance), the home mortgage ($84,000 balance; $1,100/month), and payments on a business loan for her medical practice ($51,000 balance). In addition to the initial loan to open her practice, Dr. Montemurro was similarly making payments on corporate debts of nearly $44,000). To this figure we further attach the court

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arrangement was correctly characterized as 'nearly equal.' Here, Dr. Montemurro's overnight placement was 248 days, while Luciani's was 117, a difference of approximately 131 days.

Given this disparity in figures, it is inconceivable for the dissent to suggest that the physical placement arrangement in the present case is precisely analogous to the case study example. Dissent, at 3-4. *See also supra*, n.9. Moreover, the annual income after child support of the mother in the study placed her below the poverty line, supporting the conclusion that the result was 'tremendously inequitable.' Luciani, on the other hand, is receiving $1,000 monthly in maintenance over three years, and has an annual budget which exceeds that to which he testified he would need at trial. While we recognize that a disparity in income does exist, the facts of the present case do not fit the dramatic example provided by the case study and relied upon by the dissent.

ordered $1,000 monthly maintenance award payable to Luciani for 36 months.
Page 304

With respect to the children, Dr. Montemurro had purchased the majority of their clothes, paid for counseling, guardian ad litem fees, and school tuition of $1,600 in addition to weekly child care expenses throughout the year. The physical placement stipulation between the parties had placed the children with Dr. Montemurro during the week other than the months of June and August. The total cost for those expenses associated with Dr. Montemurro's continuing care for the children was approximately $1,100 per week.

The parties had a final opportunity to offer additional support for their position when required to submit letter briefs to the court following the initial decision. Luciani's letter brief reiterated his position at trial, and though replete with allegations of unfairness, neglected to provide the appropriate figures to support these claims.

After reviewing the record, we are satisfied that the circuit court properly concluded that Luciani had failed to prove by the greater weight of the credible evidence that the presumptive application of the percentage standards would be unfair to the children or either party. The court of appeals' decision stated that it believed that the circuit court had found the disparity of the parties' incomes to be an irrelevant consideration on the question of adherence to the percentage standards. *Luciani*, 191 Wis.2d at 77. This interpretation is mistaken.

The circuit court's supplemental decision clarified that the disparity in income does not automatically trigger deviation from the percentage standards. Rather, it is but one of many factors
Page 305
that the court considers after receiving a modification request. *See* Wis. Stat. § 767.25 (1m)(hs) (1993-94).[17]

The recent decision by the court of appeals in *Kjelstrup v. Kjelstrup*, 181 Wis.2d 973, 512 N.W.2d 264 (Ct.App. 1994) demonstrates that where the parent with primary custody earns a higher income, it does not necessarily follow that "unfairness" results when the circuit court does not deviate from the percentage

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[17] At the time of the trial, Wisconsin's shared-time payer formula, as promulgated in the administrative code, did not consider the income of the primary custodial parent. Rather, it only dealt with the income of the lesser-time parent. The new shared-time formula in Wis. Admin. Code § HSS 80, effective March 1, 1995, does not consider the income of both parents until the lesser-time parent is over the 40% threshold in overnight placement. Luciani is presently at 32%. *See* Margaret W. Hickey, "New Rules for Child Support Obligations," 68 WIS. LAW. 15 (Apr. 1995); Marygold S. Melli, "Child Support by Shared-Time Parents: Why a Simple Offset Formula is Wrong," 15 WIS. J. FAM. L. 41 (Apr. 1995) (characterizing the new administrative rule in shared-time cases as a progressive effort in addressing issues raised by the author in prior articles, regarding the need to recognize the changing economic burdens of shared parenting).

standards. In *Kjelstrup*, the court commissioner increased Susan Kjelstrup's child support award, at a post-judgment modification hearing, to equal the percentage standard. Id. at 974. Rod Kjelstrup petitioned, and the court reduced the commissioner's award, stating that the application of the percentage standards would be unfair given the recent disparity in the parties' incomes.

The court of appeals reversed the decision of the circuit court because it deviated from the percentage standards by relying solely upon the income discrepancy
Page 306
among the parents. *Id.* at 976. In its analysis, the court referred to the preface of Wis. Admin. Code § HSS 80 to note the circuit court's error. The preface to the chapter provides as follows:

> The [percentage of income] standard is based on the principle that a child's standard of living should, to the degree possible, not be adversely affected because his or her parents are not living together. It [the standard] determines the percentage of a parent's income and potential income from assets that parents should contribute toward the support of children if the family does not remain together. The standard determines the minimum amount each parent is expected to contribute to the support of their children. It expects that the custodial parent shares his or her income directly with their children.

Id. (citing § HSS 80 Preface). In the present case, Luciani similarly seeks to have the support obligation modified because Dr. Montemurro earns a greater income. This argument fails to recognize the assumption that underlies application of the percentage standards, as stated above. Dr. Montemurro is presumed to contribute at least 25%[18] of her income to the children's support, thereby reducing the income disparity that Luciani relies upon. And further, as made clear by the decision in *Kjelstrup*, disparity in the parties' incomes, by itself, is not sufficient to require the court to deviate from strict adherence to the percentage standards. Absent a showing that such disparity will adversely affect the children or the parties in some demonstrative manner, it is simply one among a number of factors to be considered by the court when a

Page 307

request to deviate from the percentage standards is presented.

We conclude that the circuit court reviewed the disparity of the parties' incomes, the amount of physical placement with Luciani, as well as other relevant factors, and exhibited a reasoned process in concluding that deviation from the percentage standards was not warranted in this case. The circuit court did not err in exercising its discretion, and we therefore reverse the court of appeals on this issue.

Finally, we address Dr. Montemurro's contention that the court of appeals ignored the statutory presumption of the

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[18] *See Kjelstrup*, 181 Wis.2d at 977.

percentage standards and implicitly rewrote the statute to require the circuit court to make a threshold determination that the guidelines are to be utilized, thereby improperly shifting the burden of proof away from Luciani.

The court of appeals' error is exhibited in a series of footnotes, which set forth the issue presented by this review:

> On a somewhat similar theme, Angelina contends that the amount of support to be paid by the payer under the guidelines is not influenced by the income of the payee. We agree. The standards expect that the custodial parent share his or her income directly with the children . . . . *Here, however, the issue is whether the family court properly chose to adhere to the standards in the first instance.* It is not whether the court correctly computed Michael's support obligation under the standards. This is a subtle but important distinction. (Emphasis added.)

Luciani, 191 Wis.2d at 77 n.5. The appellate court's reversal of the percentage standards statutory

presumption in a high-income payee case is further evidenced by the following passage:

> Angelina argues that Michael's attack is on the mechanics of the shared-time formula . . . . We disagree. Michael makes no

> argument that the family court's computation of his support obligation under the shared-time payer formula was flawed. *Rather, he argues against the application of the shared-time payer formula on a threshold basis.* (Emphasis added.)

Id. at 77-78 n.6.

The appellate court's decision implies that the previously existing presumptions regarding application of the percentage standards are inapplicable in high-income disparity cases. The decision has attempted to shift the established burden of proof in cases where unfairness is alleged, from the requesting party to the circuit court. The circuit court would now be required to conduct its own threshold investigation to determine the appropriateness of the percentage standards in a high-income case, regardless of the amount of evidence presented by the requesting party. This approach ignores the administrative regulation and stated presumptions underlying the statute, *see Kjelstrup*, 181 Wis.2d at 977, as well as case law interpreting the percentage standards as an evidentiary shortcut to be utilized in determining the relative needs of the child for support. *Weidner*, 131 Wis.2d at 318.

The court of appeals' dissatisfaction with the shared-time payer formula on the basis that neither the Wisconsin Statutes nor the Administrative Code consider the income of the custodial parent, is not the relevant inquiry in light of the nature of the support guidelines as adopted in

Wisconsin. The rules promulgated

by DHSS are consistent regardless of the noncustodial parent's status as a shared-time payer or a simple payer: the custodial parent's income is generally not considered under Wisconsin law. *See supra*, n. 17. Future revisions to the mechanics of the support statutes and the shared-time payer formula in high-income cases is properly left to the province of the legislature.

The obligation to support one's children is a basic one. Luciani's contention that he should be relieved of this burden simply because his ex-wife earns a substantially higher income runs contrary to the paramount goal of child support, namely, securing the best interest of the children. *Kuchenbecker v. Schultz*, 151 Wis.2d 868, 875, 447 N.W.2d 80 (Ct.App. 1989). We recognize the role that income disparity may play in a particular case, but under the facts before us, it is only relevant where Luciani can demonstrate that he is unable to pay the court ordered child support or that such disparity in income will adversely affect the children or himself. The circuit court properly concluded that he has failed to do so in this case. Luciani's claim of unfairness is unsupported by the facts, as he enjoys an annual budget which exceeds that figure which he testified at trial would be required to maintain himself and the children.

The language in Wis. Stat. § 767.25 (1993-94) is clear. The circuit court is required to determine the appropriate amount of child support by application of the percentage standards. However, a

requesting party's showing of unfairness by the greater weight of the credible evidence will allow the court to deviate from this presumptive application.
Page 310

By the Court. - The decision of the court of appeals is affirmed in part and reversed in part.

WILLIAM A. BABLITCH, J. (*dissenting*).

I agree completely with the sound legal analysis written by the majority. Where I disagree is with the application of the law to the facts of this case. Accordingly, I respectfully dissent.

The economic facts are somewhat difficult to glean from this record, particularly because the circuit court made no specific economic analysis or findings other than some conclusory references. What we do glean from the record is the following.

Husband Michael Luciani has aftertax monthly income of approximately $1900 ($22,000 annually). Wife Dr. Angelina Luciani has aftertax monthly income of approximately $8300 ($100,000 annually). Mr. Luciani has the children for approximately 117 overnight days and 49 nonovernight days per year, a placement characterized by the court of appeals as a "nearly equal child placement provision." *Marriage of Luciani v. Montemurro-Luciani*, 191 Wis.2d 67, 77, 528 N.W.2d 477 (1995).[1]

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[1] The majority takes issue with this conclusion of the court of appeals, stating that it is "unsupported by the

He pays $650 a month rent for a home for himself and his children when they are with him. From the statement of facts presented by Dr. Luciani's attorney to the court of appeals, we further learn that Mr.
Page 311
Luciani spends about $150 monthly for utilities and $130 monthly for child care.

The majority affirms the circuit court decision that says Mr. Luciani must pay approximately $680 a month in child support. Taking into account his rent, utilities, and child care, this leaves him with approximately $290 a month for himself (and his children when they are with him) for expenses such as food, car, gasoline, clothing, car insurance, health insurance, life insurance, and incidentals. It leaves him with little or no discretionary income to spend on gifts, entertainment, vacations and the like for either himself or the children. We compare this to his wife who will have more than ample discretionary income to bestow upon the children, a fact that will certainly resonate with them as they get older.

On the face of it, this result is tantamount to forced impoverishment of one

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record. . . . In fact, the children's total overnight placement with their father is less than one-third." See majority op. at 293, fn. 9. Of course, the one-third figure is accurate, but only with respect to overnight placement. Mr. Luciani also has the children for 49 nonovernight days (4 hours per day). Although this is not equal time, it is certainly arguable that this placement approaches it.

spouse while the other spouse has ample income to live exceedingly well.[2] Without further economic analysis by the circuit court with respect to the circumstances of each party, this result could hardly be more inèquitable.

What we have here is a situation in which the non-primary parent with a substantially lower income than the primary parent has a time share with the children that approaches equal time. Such a situation was

Page 312

directly addressed in a 1992 study authored by Marygold S. Melli and Pat Brown under a contract between the Wisconsin Department of Health & Social Services and the Institute for Research on Poverty, entitled "Child Support in Shared Physical Custody in Wisconsin: Present Guidelines and Possible Alternatives."

In addressing the shared-time formula, the authors state that the formula results in inequitable award

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[2] Although the circuit court provided a maintenance award of $1000 a month, maintenance is payable for only 36 months. After that, according to the circuit court, "maintenance shall be barred." At that time, the two children will be ages 8 and 9.

Although the majority argues that Mr. Luciani may seek revision after the maintenance expires, the family court's order that "maintenance shall be barred" leaves scant hope that such request would be viewed with favor absent some change in circumstance other than the termination of maintenance.

calculations in two situations: one, where the non-primary parent's time share approaches equal; two, where the non-primary parent has a lower income. Where both situations are present, as they are here with husband Luciani, the authors state unequivocally: "the resulting support award, as calculated by the formula currently in effect, *produces markedly inequitable results*." *Id.* at 15 (emphasis added).

The authors use an example, outlined more fully below,[3] in which the mother is the non-primary parent with $3000 less income than the father, but, after paying support consistent with the current formula, ends up with nearly $10,000 less

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[3] The authors state:

> In this case, a mother who has her children living in her home for 15 fewer days over the course of a year than the father, and who has a yearly income of $16,000 versus a yearly income of $19,000 for the father, would be ordered to pay the father $3,282 per year using the formula currently in effect. The family incomes which would result after the child support transfer are, for the father, $22,292; for the mother, $12,718. The disparity in family finances which results from the application of the current shared custody child support formula would be tremendously inequitable in this case for the mother and the children.

Melli, *Child Support in Shared Physical Custody*, at 17 (emphasis added).

yearly income than the

father. The authors' conclusion is that this is "tremendously inequitable" to the mother. *Id.* at 17.

Here, the facts are different from their example only with respect to who the non-primary parent is (and of course gender should make no difference) and the amount of the income disparity (which is far greater here than in the example where the authors found the disparity to be "tremendously inequitable" to the mother).

There is a way for this court to resolve the inequity: put teeth into the statutory provision which permits the court to deviate from the standards if the court finds by the greater weight of the credible evidence that the use of the standards is unfair to the children or the party requesting such deviation. See Wis. Stat. § 767.25(1m). To do so requires far more fact finding than is presented by this record.

I conclude that Judge Nettesheim, writing for a unanimous court of appeals, got it exactly right. That court concluded that the circuit court "erred in the exercise of its discretion . . . by failing to analyze the economic consequences of the support order in light of the parties' budgets, incomes and nearly equal child placement provisions." *Id.* Even a cursory look at both circuit court decisions compel this conclusion. Not one figure is cited. There is no analysis whatsoever. All statements are conclusory.

The majority says Mr. Luciani failed to prove by the greater weight of the

credible evidence that the presumptive application of the percentage standards would be unfair to either the parties or the children. What more does he need to produce other than the above described facts to establish basic inequity? These facts, on their face, are more than enough evidence to overcome the presumption. I agree with the court of
Page 314
appeals that this case must be sent back for further economic analysis. High income disparity cases present significant problems of fairness, requiring a high degree of economic analysis. Without such analysis, at the very least a perception of unfairness will inevitably linger. Accordingly, I dissent.